Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

NEERAN ZAIA,

Petitioner,

-vs-

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SIXTH CIRCUIT INCORRECTLY APPLIED AN ENTRAPMENT ANALYSIS WHICH WAS UNDULY RESTRICTIVE UNDER THIS COURT'S DECISION IN JACOBSON v. UNITED STATES, 112 S.Ct. 1535 (1992), CREATING A SHARP CONFLICT WITH POST-JACOBSON ENTRAPMENT CASES FROM THE SEVENTH AND FIFTH CIRCUITS.

II. WHETHER THE SIXTH CIRCUIT ERRED IN COMPLETELY ABANDONING THE DUE PROCESS-BASED DEFENSE OF OUTRAGEOUS GOVERNMENTAL CONDUCT, WHICH HAS BEEN RECOGNIZED BY THIS COURT AND APPLIED TO THE BENEFIT OF DEFENDANTS IN THE NINTH, TENTH AND THIRD CIRCUITS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner NEERAN ZAIA, through her attorneys, R. STEVEN WHALEN and DONALD C. DOERR, respectfully asks that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The full text of the opinion of the United States Court of Appeals for the

Sixth Circuit, Docket No. 93-1452, released on September 2, 1994, is reproduced in the Appendix, p. 1a.

The judgment of the United States District Court for the Eastern District of Michigan in United States v. Neeran Zaia, No. 92-CR-80137-01-DT, is reproduced in the Appendix, p. 37a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 2, 1994 .

This Court's jurisdiction is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads as follows, in pertinent part:

> "No person shall...be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

Petitioner NEERAN ZAIA was tried before a jury in the United States District Court for the Eastern District of Michigan, the Honorable Bernard A. Friedman, presiding, on an indictment charging 12 counts of visa fraud, 18 U.S.C. sec. 1546(a), seven counts of bribery, 18 U.S.C. sec. 201(b)(1), and one count of alien smuggling, 8 U.S.C. sec. 1324(a)(1)(D).[1] The jury convicted her of seven counts of visa fraud, three counts of bribery, and the alien smuggling charge, and acquitted her of the remaining counts.

On March 15, 1993, Petitioner was sentenced to 15 months imprisonment on each count of conviction, to be served concurrently. On September 2, 1994, the United States Court of Appeals for the

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[1] A count of conspiracy to smuggle aliens, 18 U.S.C. sec. 371, was dismissed on the government's motion.

Sixth Circuit affirmed Petitioner's convictions.

The charges against Petitioner arose out of actions she took in late 1991 and early 1992 to help a group of Iraqi refugees flee from Jordan, where they faced persecution in the wake of the Persian Gulf war.

Sue Williams, an American expatriate, testified that she was the owner of Mom's restaurant and hotel in Belize City, Belize, and that she had lived in Belize since 1973. Mom's is located within walking distance of the U.S. Embassy in Belize City, and Williams was acquainted with Rudolph (Rudy) Boone, head of the consular section at the Embassy.

Williams said that in January of 1992, Petitioner came to her hotel seeking lodging for a group of 16 people. They checked in on January 19, 1992, and

stayed about three weeks, until February 12, 1992. Williams said that the group, which included a 3-year-old child and a pregnant woman, mostly stayed around the hotel, and seemed to be angry and frustrated over the time they were spending in Belize, often asking Petitioner when they were going to be leaving. At one point, a fist-fight broke out between two men in the group. Williams said that the group was also getting on her nerves, that she did not want them there, and that she may have asked them to leave at one point.

Sue Williams testified that Rudy Boone called her from the Embassy, and asked her to let him know if she heard anything unusual from the group. Williams testified that about one week later, Petitioner asked her if she knew anyone at the Embassy who could help the group get visas to enter the United States.

According to Williams, Petitioner said that she tried unsuccessfully to get U.S. visas at the Embassy in the Dominican Republic, so she was afraid to go directly to the Embassy in Belize. Williams claimed that Ms. Petitioner said that they could both make a lot of money. Petitioner also told Williams that she had retained the services of a Belizean attorney, Margaret Mousef, to assist the group. Ms. Mousef was the sister of Saaed Mousef, the Deputy Prime Minister of Belize. According to Sue Williams, Petitioner said that if the group could not get U.S. visas, they would return to Santo Domingo.

Rudolph Boone was the U.S. consul at the U.S. Embassy in Belize in 1991 and early 1992. He testified that in January of 1992, following a telephone conversation with Sue Williams, he instructed Ms. Williams to call him if

she heard anything unusual with regard to her Iraqi guests. Prior to this time, and unrelated to the Petitioner, Boone had asked Williams to be an Embassy "Warden," which he characterized as "the eyes and ears of the Embassy," i.e., a civilian who would act as an informant and provide him with whatever she considered suspicious information.

Mr. Boone admitted that even before the group arrived in Belize, he was aware that Petitioner had gone to the U.S. Embassy in the Dominican Republic seeking visas, with World Service Authority passports as identification. He stated that there was nothing illegal about this. A few days before Petitioner and the 16 Iraqis arrived in Belize, Mr. Boone called the Mexican Embassy in Belize and informed them that a group of Iraqis were arriving. He also sent a cable to the State Department in

Washington, D.C. He testified that at the time Petitioner arrived in Belize, he had no information that the Iraqis were attempting to enter the United States illegally. Mr. Boone stated that Petitioner and her group were met at the Belize airport by Margaret Mousef, the sister of the Deputy Prime Minister.

After receiving a call from Sue Williams, Mr. Boone informed the U.S. Ambassador in Belize and the State Department in Washington, after which Agents Robert Valente and Jeffrey Culvert, of the U.S. Diplomatic Security Service, arrived in Belize. It was decided that Mr. Boone would initiate a meeting with Petitioner, and would surreptitiously tape their conversation with a hidden micro-cassette recorder. Boone had no training as a law enforcement officer, and he said that his general instructions from Agents Valente

and Culvert were to find out what the Petitioner's concerns were. He was instructed as to various subterfuges and false statements he might used, but said that his story about being a disgruntled foreign service worker who wanted to open a bakery in Barbados was spontaneous. Mr. Boone testified that he had in his own mind a concept of the "fine line" between a proper and improper overture from Petitioner, and that once she had, in his estimation, crossed that line, he believed he had a "carte blanche" to do certain things he otherwise would not have done.

Mr. Boone first met with Petitioner at Mom's Restaurant on February 5, 1992. He initiated the meeting by arriving unannounced at the restaurant. The tape of that meeting was played for the jury.[2]

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[2] The contents of the tape-recorded conversations between Mr. Boone and Ms. Zaia were not transcribed in the trial

At the meeting, Boone introduced himself, and asked if they could talk a bit. Petitioner asked what it was regarding. Mr. Boone conceded at trial that although he told Petitioner that he was the "chief of the section," he did not immediately identify himself as being connected to the American Embassy. Boone began the conversation as follows:

BOONE: I've gotten word from some people that you're here.

ZAIA: Okay.

BOONE: And I wanted to talk to you about your situation.

ZAIA: Situation? What kind of situation?

BOONE: Can we close the door?...And um, you might need some help and I was wondering what that was. I am the counsel, the chief of the section.

transcript by the court reporter. Rather, the written transcription of the tapes prepared before trial, and provided to the jury, represents the only available transcript. The transcript of the initial meeting of February 5, 1992, is contained in the Appendix, pp. 43a to 83a.

ZAIA: Okay.

BOONE: And ah, that's it.

ZAIA: You mean if I need help, you mean, you can help?

BOONE: With your group, ah--

ZAIA: Well, most of them, they like to stay here. (Appendix, 50a-51a).

Petitioner then talked about her efforts to obtain Belizean "economic citizenship" for the Iraqis, where they would be granted citizenship if they invested in Belize (Appendix, 53a-54a). At trial, Boone testified that this was at one time a program legally offered by Belize, and that he did not advise Petitioner that the program was no longer operative.

At the 2-5-92 meeting, Boone expressed sympathy for the plight of refugees from the Middle East, relating the story of his friend "Tafique," who was, in Boone's words, "a displaced, stateless person." (Appendix, 56a-57a).

Boone continued:

> "But I understand, I think, the Middle East situation and the different way because of Tafique and ah, and he's used to say he was a warrior, you know, he was a Christian and how difficult it is in that part of the world to live because he came from a fine family. His father was a doctor; he was a lawyer, you know. He had to practice law for King Faud in Saudi Arabia for two years, and so, there is this understanding, this feeling.
>
> "So, if I can help you, let me know." (Appendix, 56a-57a)

Petitioner then told Mr. Boone that she was working with a Belizean attorney to try to get visas for her group, and that the lawyer had been in contact with the Mexican embassy (Appendix, 58a). Boone then talked about the great difficulty in getting Mexican visas, and, again bringing up the example of "Tafique," said that there would be a problem without U.S. visas (Appendix, 58a-59a). When Petitioner herself said

that she wanted to help people in the Middle East who wanted to run away because of the war, Mr. Boone intimated that then-President Bush was going to initiate another confrontation with Sadaam Hussein in order to increase his chances of reelection (Appendix, 61a-62a).

At this initial meeting, Petitioner continued to express confusion as to what kind of help Mr. Boone was proposing, and at one point asked if he could help her get Belizean passports for the people in her group (Appendix, 65a-66a). When Mr. Boone asked her to "show some good faith," Petitioner asked, "So what do you want me to show you?" (Appendix, 66a-67a). At this point, Mr. Boone directly asked, "How much is this worth to you," and, when he finally stated that he was from the American Embassy, Petitioner expressed surprise:

BOONE: How much is this worth to you?

ZAIA: I don't know what you gonna do to them. Because I don't know what you're gonna do.

BOONE: Well, if you want visas, if that's what you want-
ZAIA: Visas to where?

BOONE: To the U.S.

ZAIA: You can do to U.S.?

BOONE: Yes.

ZAIA: Oh my God! How long that take?

BOONE: I've gotta do it within the course of the day because if the reconciliation, see; the numbers have to be--it's an easy process. And the thing about why people don't realize how easy it is, is that we don't keep records of the issuances beyond six months.

ZAIA: So you work with the U.S. Embassy?

BOONE: I'm the chief of the section.

ZAIA: Oh, my God!" (Appendix, 68a-69a)

At trial, Mr. Boone conceded that up to this point, there was no indication that Petitioner was seeking access to the

United States for the group of Iraqis.

Mr. Boone then suggested that Petitioner pay him $300 per visa, and Petitioner agreed (Appendix, 71a). He testified that when he asked for this money, he knew that Petitioner had already tried to get U.S. visas legitimately in the Dominican Republic. Boone asked that he be given two of the Iraqi passports to start, and that he would call her later that evening (Appendix, 73a-74a). He concluded the conversation by complimenting Petitioner on her English (Appendix, 82a).[3]

Mr. Boone testified that on February 5, 1992, Petitioner gave him four Iraqi passports. These passports related to the following exhibit numbers, persons and counts in the indictment:

Govt. Ex. 1: Shahin Aram (Count I)

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[3] Ms. Zaia is a naturalized U.S. citizen. English is not her first language.

Govt. Ex. 2: Azhar Mikha (Count II)

Govt. Ex. 3: Faris Yousif(Count III)

Govt. Ex. 4: Shatha Ayoob(Count IV)

Each exhibit had a U.S. nonimmigrant visa stamped in it; Boone testified that he issued the visas fraudulently, with the consent of Agents Valente and Culvert. Government Exhibit 3, Shatha Ayoob's passport, also contained a visa for her child, Taif. Count V of the indictment charged the fraudulent procurement of Taif's visa.

Mr. Boone testified that on February 5, 1992, Petitioner also gave him the equivalent of $450 U.S. as payment for the Mikha and Aram visas. (This money formed the basis of the bribery allegation in Count XIII of the indictment, of which Petitioner was found not guilty). He said that he talked to Petitioner about getting a total of 12 visas for the group.

Mr. Boone and Petitioner met six more times in Belize, between February 6 and February 11, 1992. At the first meeting on February 6th, Boone received the equivalent of $150 U.S., and at the second meeting on February 6th, he received an additional $100. (These funds formed the basis of the bribery charges in Counts XIV and XV of the indictment, of which Petitioner was acquitted). At this second meeting on February 6th, Boone refused to accept a traveller's check, and threatened to stop the issuance of the visas for the remaining refugees.

On February 7, 1992, Boone gave the Petitioner the passports of Yousif and Ayoob, stamped with U.S. visas. They next met on February 10, 1992, at which time Petitioner gave Boone the equivalent of $500 U.S., in payment for the visas for Yousif and Ayoob. (This money formed the

basis of Count XVI, of which Petitioner was acquitted). At that time, Boone said, they talked about obtaining seven more visas for a total price of $3,000 U.S. On February 10th, Mr. Boone testified, Petitioner gave him three more Iraqi passports:

Govt. Ex. 6: Kovay Aywan (Count VI)

Govt. Ex. 7: Meisheil Antoon (Count VII)

Govt. Ex. 8: Maram Zaia (Count VIII)

Boone testified that he stamped fraudulent U.S. visas in these passports.

Mr. Boone testified that he and Petitioner next met on February 11, 1992, at which time Petitioner gave him three passports and an affidavit in lieu of a lost passport:

Govt. Ex. 9: Ghosan Jarjin (Count IX)

Govt. Ex. 10: Nebras Daewood (Count X)

Govt. Ex. 11: Sarmad Marogy

(Count XI)

Govt. Ex. 12: Hisham Mansour
(Count XII)

Petitioner at this time gave Mr. Boone $1,000 in Belizean currency ($500 U.S.), which formed the basis of Count XVII. At a second meeting on February 11, 1992, Petitioner tendered $4,900 in Belizean currency. (This money formed the basis of the bribery charge in Count XVIII). At that time, Mr. Boone returned Government Exhibits 9 through 12 to Petitioner.

Charles Shepler, a U.S. Immigration Officer, was on duty at the New Orleans airport on February 12, 1992. He testified that around noon, he questioned Petitioner, who had arrived at the airport with a group of six Iraqi citizens. He said that the Iraqis had round-trip tickets from Belize, and their nonimmigrant U.S. visas were dated February 12, 1992. He said that

Petitioner's name had come up on his computer, with instructions to contact a joint federal task force. After doing so, Mr. Shepler was contacted by Immigration agent Timothy Houghteling in Detroit, who advised him that they were trying to establish a criminal case against Petitioner, and instructed him to admit the Iraqis into the U.S.

James P. Ennis, an agent with the U.S. Department of Diplomatic Security, was stationed at the U.S. Embassy in Santo Domingo, the Dominican Republic, on October 30, 1991. On that day, Petitioner came to the Embassy to request transit visas for a group of Iraqis, which would enable the group to fly to the Miami, and then transfer to a plane to Acapulco, Mexico. Petitioner identified herself with a valid U.S. passport, and presented 18 World Service Authority passports for the Iraqis, which contained photographs

and identifying information for everyone in her group. Mr. Ennis testified that the visas were not granted, and that the following day, Petitioner returned to the Embassy to pick up the passports. According to Ennis, Petitioner stated that if she could not get U.S. transit visas from the Embassy, she would contact Mexican officials.

George Charles Lannon was employed at the visa services section at the U.S. State Department. He explained that the World Service Authority (WSA) is an international group which believes in world citizenship, and which issues passports to people who subscribe to its beliefs. He said the United States will not issue visas based on WSA passports, but that some countries might.

Mr. Lannon testified that in late 1990 or early 1991, the U.S. Embassy in Iraq closed operations, and that during

the Gulf War, papers at the U.S. Embassy in Baghdad were destroyed. Therefore, he said, it would be very difficult for an Iraqi refugee in Jordan to get a visa from the U.S. Embassy in Amman, Jordan without documentation other than an Iraqi passport.

Robert Valente was an agent with the Diplomatic Security Service, a branch of the U.S. State Department which conducts criminal investigations. He testified that around January 30, 1992, he received a diplomatic cable from the U.S. Embassy in Belize that Petitioner was there with a group of about 12 Iraqis. Mr. Valente arrived in Belize on February 4, 1992, and recruited Chief Consul Rudolph Boone to initiate a meeting with Petitioner, and to surreptitiously record the conversation. He told Boone to treat the meeting as a "normal consular matter," and to leave the meeting open-ended, so

that he could assess the situation. Subsequent meetings between Mr. Boone and Petitioner were also taped, although during the second meeting on February 5, 1992, the tape recorder was inadvertently shut off.

Before he set up the first meeting, Agent Valente told Mr. Boone that the whole situation with the Iraqis could be an innocent misunderstanding, or that it could be a case of a U.S. citizen with a legitimate problem. He told Boone that the situation might change if Petitioner made illegal overtures, but that he (Valente) would assess the situation after the first meeting. Agent Valente testified that when he arrived in Belize, he was aware of the following facts: (1) that Petitioner was a U.S. citizen, legally in Belize with a valid passport and Belizean visa; (2) she had presented herself to the U.S. Embassy in Santo

Domingo, and properly identified herself; (3) in Santo Domingo, she legally applied for visas for the group of Iraqis, who were all identified by documentation provided to the Embassy; and (4) Petitioner informed the consular official in Santo Domingo that if she could not get U.S. transit visas for the Iraqis, she would try to get them Mexican visas.

Agent Valente testified that after the first meeting with Petitioner on February 5, 1992, he decided to have Mr. Boone issue the visas to the Iraqis in multiple groups, rather than doing all 12 at the same time. He said that he, not Mr. Boone, decided how many separate transactions there would be.

Agent Valente testified that the Iraqis who were admitted into the United States pursuant to his plan were all decent, educated people who posed no threat to American security or to the

interests of the American people, and that it was more important to him to arrest Petitioner than to prevent these 12 people from entering the United States.

Several of the Iraqi refugees, who were all Chaldean Catholics, testified that circumstances in the Middle East were such that, even after they fled to Jordan, they were pursued by agents of Sadaam Hussein's government. They testified that Petitioner met them in Amman, Jordan, and arranged for their travel to the Dominican Republic. Their understanding was that Petitioner would try to get them visas to stay in Mexico, not the United States. The refugees also testified about the difficulties they encountered after arriving in the Dominican Republic.

The testimony of Faris J. Yousif was representative of the refugee's stories.

Mr. Yousif testified that he left Iraq in July of 1991, with his wife and 8-month-old son, and went to Amman, Jordan. He testified that he was in trouble in Iraq because he was called into the army, and refused orders to invade Kuwait. He said that it was very bad for him and his family in Iraq, and that the Iraqi government had registered his son for military service, even though his son was only an infant.

Mr. Yousif testified that he wanted to leave Jordan because it was not safe there for him and his family, owing to the good relations between the government of Sadaam Hussein and the Jordanian government. In Jordan, he worried about Iraqi spies. He hid at his brother's house in Jordan, because Iraqi agents were looking for him. He found out later that his brother was killed in Iraq.

In October of 1991, Mr. Yousif met

Petitioner at a tour agency in Amman, and arranged to leave the country with the group of 16 Iraqis, which included seven young girls and boys, his own infant son, and a pregnant woman. They flew to the Dominican Republic, where they stayed for two months. During this time, Petitioner was trying to arrange for Mexican visas for the group. As time was running out on their Dominican Republic visas, they went to Nicaragua in December of 1991. Petitioner told them that it might be easier to get Mexican visas in Nicaragua. However, the Nicaraguans refused them entry, and sent them to Guatemala. The Guatemalan officials threatened to send them back to Iraq. Mr. Yousif said that in Nicaragua, the officials tried to extort money from them.

While the group was being detained at the airport in Guatemala, Hazim Saeegh arrived, and contacted a representative

of the United Nations High Commission on Refugees in Guatemala. The U.N. representative told the Guatemalan officials that the Iraqis were refugees, and that they were sentencing them to death if they sent the group back to Iraq.

The group was permitted to return to the Dominican Republic, where Mr. Saeegh arranged for a U.N. representative from Venezuela to talk to them. They were under guard in the Dominican Republic, and Petitioner and Mr. Saeegh, along with a lawyer, tried to get them visas to stay there. The Dominican government gave them 10 days to resolve the situation, or they would be deported to Iraq. Petitioner and Mr. Saeegh met with a representative of the President of the Dominican Republic, and obtained an extension on their visas.

After obtaining additional documentation which they understood the

Nicaraguans to have demanded, the group returned to Nicaragua a second time, but were again refused entry. From Nicaragua, they went to Belize, being admitted to the country on Belizean visas which Petitioner had obtained for them. Mr. Yousif said that the group had a deadline by which they had to leave Belize, or be sent back to Iraq. During this time, Petitioner went to Mexico to try to arrange for Mexican visas. Mr. Yousif testified that he stayed in Belize for about three weeks, and then flew to Houston, with a U.S. visa which Petitioner had arranged for him.

Father Jaques Yasso, the pastor of Sacred Heart Church, a Chaldean Catholic Church in the Detroit area, described the terrible conditions that Chaldean Catholics faced in Iraq since the Ba'ath Party took over in 1968, and how conditions had worsened since the Iran-

Iraq war. He said that he encouraged Petitioner to help Iraqi refugees in other parts of the world.

Father Doma Behanan, also a Chaldean Catholic priest, testified that he often referred members of his parish to Petitioner for assistance.

The District Court judge sentenced Petitioner to 15 months imprisonment, the lowest sentence possible under the guidelines as he scored them. The judge stated that this was "the toughest case I've had as a judge, in terms of sentencing," and noted that Petitioner did some good, as the people she helped were in substantial jeopardy. He stated that the Iraqi witnesses would have been killed if they had not left Iraq. In denying a defense motion for a downward departure from the guidelines based on sec. 5K2.11, the judge said that Petitioner did indeed prevent a "greater

harm" to the 16 refugees, but that this did not fit into a 5K2.11 departure. The judge added that he would impose a lesser sentence if he could:

> "If I were free to fashion a sentence which I thought was appropriate in this particular matter, the record should clearly reflect it would not be the minimum under the sentencing guideline, but I'm just not free to do that."

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT INCORRECTLY APPLIED THIS COURT'S DECISION IN JACOBSON v. UNITED STATES, AND IS IN CLEAR CONFLICT WITH THE SEVENTH AND FIFTH CIRCUITS REGARDING THE SCOPE OF THE ENTRAPMENT DEFENSE.

The defense in this case was entrapment. Petitioner argued in both the District Court and the Sixth Circuit that the prosecution failed to present sufficient evidence to show beyond a reasonable doubt that she was not entrapped by the actions of U.S. Consul

Rudolph Boone.[4]

The viability of this entrapment issue depends upon the interpretation of this Court's decision in Jacobson v. United States.[5] In this regard, the Sixth Circuit's opinion, which relied on United States v. Kussmaul[6], is in conflict with the Seventh Circuit's en banc decision in United States v. Hollingsworth[7] and the Fifth Circuit's decision in United States

[4] In reviewing a sufficiency of the evidence challenge, the Court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier-of-fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Where evidence is presented which would support a defense of entrapment, the government is required to prove lack of entrapment beyond a reasonable doubt. Jacobson v. United Sates, 112 S.Ct. 1535, 1540 (1992).

[5] 112 S.Ct. 1535 (1992).

[6] 987 F.2d 345 (6th Cir. 1993).

[7] 27 F.3d 1196 (7th Cir. 1994).

v. Sandoval.[8] This conflict among the Circuits suggests a need for this Court to clarify its decision in Jacobson.

The nature of the conflict is most clearly shown by the Seventh Circuit's decision in United States v. Hollingsworth, which is itself a closely divided (six to five) en banc opinion.[9] Writing for the majority, Chief Judge Posner first noted that historically, the defense of entrapment encompassed two elements: inducement and predisposition.[10] He then stated that Jacobson "changed the landscape of the entrapment defense," Hollingsworth, 27 F.3d at 1198, by refining the meaning of predisposition. The majority stated:

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[8] 20 F.3d 134 (5th Cir. 1994).

[9] The vote in Jacobson was also close (five to four, with Justice White writing the majority opinion).

[10] See Matthews v. United States, 485 U.S. 58, 62-63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988).

"[T]he [Jacobson] Court clarified the meaning of predisposition. Predisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force. The dictionary definitions of the word include `tendency' as well as `inclination.' The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation. A public official is in a position to take bribes; a drug addict to deal drugs; a gun dealer to engage in illegal gun sales. For these and other traditional targets of stings all that must be shown to establish predisposition and thus defeat the defense of entrapment is willingness to violate the law without extraordinary inducements; ability can be presumed. It is different when the defendant is not in a position without the government's help to become involved in illegal activity."

(Emphasis added).

In Hollingsworth, the defendants

were a farmer and a dentist who decided to become international financiers, "a vocation for which neither had any training, contacts, aptitude, or experience." 27 F.3d at 1200. Losing money, they advertised the sale of their Grenadan banking license. Seeing the advertisement in USA Today, a U.S. customs agent contacted the defendants, and, adopting an undercover persona, induced them to help him in a money laundering scheme.

Applying the above interpretation of Jacobson, the Seventh Circuit majority held that the Hollingsworth defendants were entrapped because, although they readily accepted the government agent's offer to launder money, they were never in a position to break the law before the government's intervention. In other words, they may have had the "pure mental state" to break the law, but they "had no

prayer of becoming money launderers without the government's aid." 27 F.3d at 1202.

There were three separate dissenting opinions in Hollingsworth. Judge Ripple, in whose opinion four other judges joined, wrote that the majority interpreted Jacobson as creating a new element for the entrapment defense: readiness to commit the crime, as distinguished from mere willingness.[11] Judge Easterbrook described the analytical schism between majority and dissent this way:

> "After all, what six judges of this court see in Jacobson, five others think a mirage. As we approach a thousand judges on the federal courts, such differences in visual acuity

[11] "Clarifying the position of the majority, the court now asserts that Jacobson significantly changed the law of entrapment and changed it in a way that necessitates the introduction of their new concept of `readiness' into entrapment analysis." 27 F.3d at 1216 (dissenting opinion, of Ripple, J.).

have the potential to transmute Norman Rockwell's view of the world into Joan Miró's." 27 F.3d at 1212 (dissenting opinion of Easterbrook, J.).

Judge Ripple's dissent cited the Sixth Circuit decision in United States v. Kussmaul, supra, on which the Sixth Circuit panel in the present case relied. In the present case, the Sixth Circuit noted the conflict between itself and the Seventh Circuit as to how Jacobson is to be applied, and approved the Hollingsworth dissent:

> "Hollingsworth relies upon Jacobson to support the distinction between a defendant's being `willing' to commit a crime, meaning that she desires the outcome of the imagined illegal act, and her being `ready' to commit that crime, meaning that she is prepared to take the steps necessary to complete the actual crime. 9 F.3d at 598-99. The case law in our circuit, however, is more in line with the Hollingsworth dissent's reliance upon Jacobson for the proposition that `predisposition is demonstrated by the defendant's ready commission of [a] criminal act.'"

Neither Kussmaul nor the dissent in Hollingsworth, however, acknowledges the following language in Jacobson:

> "Petitioner's ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails." 112 S.Ct. at 1543.

Thus, contrary to the interpretation of Kussmaul and the Hollingsworth dissent, Jacobson does not presume predisposition from the alacrity with which a defendant accepts the government's invitation to crime. If it did, then this Court would have rejected Mr. Jacobson's defense.[12] In this regard, the conflict between the Sixth and Seventh Circuits is manifest, as is the conflict between the Sixth Circuit and this Court's decision in

[12] Indeed, Justice O'Connor made this point in her dissenting opinion in Jacobson, 112 S.Ct at 1543 (dissenting opinion of Justice O'Connor).

Jacobson.

The Fifth Circuit in United States v. Sandoval[13] applied Jacobson in reversing a bribery conviction in which the facts were strikingly similar to those of Petitioner's case. In Sandoval, the defendant inquired of an Internal Revenue Service agent regarding the agency's reward program for information on tax evaders. The I.R.S. was reassessing the 1988 tax liability of the defendant and his wife, and the agent believed that the defendant might be trying to solicit a bribe. The agent set up a meeting with the defendant, in which she hinted that she would be interested in a bribe. Although the defendant initially expressed interest only in the reward program, the agent continued to push the idea of a bribe, asking, "What's

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[13] 20 F.3d 134 (5th Cir. 1994).

in it for me,"[14] and impressing the defendant with the risks she was taking. At the conclusion of the meeting, the defendant agreed to pay a bribe of $3,000.

As in Petitioner's case, the government in Sandoval initiated the bribery scheme. The Fifth Circuit found that the agent "play[ed] on [defendant's] weaknesses and pressure[d] him into accepting the scheme." 20 F.3d at 137. Significantly, the court found that the fact that the defendant agreed to the scheme after a single meeting, as opposed to the 26 months of government activity in Jacobson, was not determinative of the predisposition question: "The time involved is less important than the degree of pressure applied." 20 F.3d at 138.

[14] These were the exact words used by Rudolph Boone in Petitioner's case.

Sandoval cannot be reconciled with the Sixth Circuit's ruling in Petitioner's case. While the Sandoval analysis is not as detailed as Hollingsworth, it seems clear that the Fifth Circuit, as well as the Seventh Circuit, would have reversed Petitioner's conviction on the basis of United States v. Jacobson.

Under Jacobson, as applied by Hollingsworth and Sandoval, there was insufficient proof that Petitioner was predisposed, i.e., ready and willing, to commit the crimes of visa fraud, bribery and alien smuggling prior to the inducement offered by U.S. Consul Rudy Boone. In addition, given the life and death situation facing the 16 Iraqis, the government's inducement to commit these crimes was so strong as to be virtually irresistible to Petitioner or to anyone else in her position. As the

Hollingsworth majority stated, "[I]nducement is significant chiefly as evidence bearing on predisposition: the greater the inducement, the weaker the inference that in yielding to it the defendant demonstrated that he was predisposed to commit the crime." 27 F.3d at 1200.

Petitioner's lack of independent predisposition to commit the crimes with which she was charged is evidenced by her conduct prior to her contact with Mr. Boone. That conduct was legal, as acknowledged by Agent Valente. Petitioner attempted to get transit visas from the U.S. Embassy in Santo Domingo, worked with Mexican, Dominican Republic and United Nations officials, and retained attorneys in Belize and the Dominican Republic.[15]

[15] In footnote 4 of its opinion in the present case, the Sixth Circuit refers to a government allegation of "the

No doubt Petitioner was extremely anxious to make sure that her group was not sent back to the Middle East, where they faced dire consequences. However, as was the case in Jacobson v. United States, supra, 112 S.Ct. at 1541, she had acted within the law at the time she was

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attempt to bribe a Guatemalan immigration official prior to arriving in Belize." Appendix, p. 15a. In fact, there was no substantive evidence of this allegation at trial. The government questioned Rudolph Boone on redirect examination regarding a diplomatic cable he allegedly received which referred to an attempt to bribe a Guatemalan official. The defense objected and moved for a mistrial. At a colloquy outside the hearing of the jury, the government conceded that the document was hearsay, proffering it not to show the truth of the allegations therein, but to show why Mr. Boone took certain subsequent actions. The trial judge refused the government's request to read the cable into the record and, although he denied a mistrial, gave the jury a cautionary instruction on similar acts evidence at the conclusion of the case. In short, this cable contained multiple levels of hearsay, was not shown to be reliable, and was not admitted as substantive evidence. (The objected-to testimony and the colloquy are found in the trial transcript of 12-7-92, pp. 170-180).

induced by U.S. government officials. As this Court held in Jacobson:

> "We simply conclude that proof that petitioner engaged in legal conduct and possessed certain generalized personal inclinations is not sufficient evidence to prove beyond a reasonable doubt that he would have been predisposed to commit the crime charged independent of the Government's coaxing" Id., 112 S.Ct. at 1542, n. 3.

Indeed, Agent Valente testified that when he first arrived in Belize and recruited Rudy Boone to work in an undercover capacity, he told Mr. Boone that the whole situation with the Iraqis could be an innocent misunderstanding, or that it could be a case of a U.S. citizen with a legitimate problem.

Even during the initial part of the February 5, 1992 meeting between Petitioner and Mr. Boone, the Petitioner showed little predisposition to committing the crimes of U.S. visa fraud,

bribery and alien smuggling.[16] Before Boone revealed that he was from the U.S. Embassy and that he could help her get U.S. visas for $300 each, Petitioner stated that her group would either like to stay in Belize or go to Mexico, and even in that context, she asked for nothing illegal. It was Mr. Boone, not Petitioner, who brought up the possibility of getting U.S. visas; it was Mr. Boone, not Petitioner who asked, "What's in it for me;" and it was Mr. Boone, not Petitioner, who suggested the

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[16] The only other evidence of predisposition on which the government relied was the testimony of Sue Williams that Petitioner asked if she knew anyone at the embassy who could help her. It would be a tremendous inferential leap to interpret this statement as expressing interest in bribing an official, as opposed to seeking legitimate help from someone who was acquainted with embassy officials. See United States v. Sandoval, supra. Agent Valente, who was aware of the information from Ms. Williams when he arrived in Belize, conceded that he was not at that point convinced that Ms. Zaia was anything more than an American citizen with a legitimate problem.

amount which should be paid for the visas.

Furthermore, Petitioner's lack of predisposition to bribe a U.S. official in order to obtain fraudulent visas is shown by her surprise when Mr. Boone revealed his position with the U.S. Embassy and his willingness to sell her visas:

> BOONE: How much is this worth to you?
>
> ZAIA: I don't know what you gonna do to them. Because I don't know what you're gonna do.
>
> BOONE: Well, if you want visas, if that's what you want-
> ZAIA: Visas to where?
>
> BOONE: To the U.S.
>
> ZAIA: You can do to U.S.?
>
> BOONE: Yes.
>
> ZAIA: Oh my God! How long that take?
>
> BOONE: I've gotta do it within the course of the day because if the reconciliation, see; the numbers have to be--it's an easy process. And the thing

about why people don't realize how easy it is, is that we don't keep records of the issuances beyond six months.

ZAIA: So you work with the U.S. Embassy?

BOONE: I'm the chief of the section.

ZAIA: Oh, my God!" (Appendix, 68a-69a).

The nature of the inducement offered by the government must be weighed in considering an entrapment defense. United States v. Hollingsworth, supra. In discussing the "inducement" prong of the entrapment in this case, it should first be noted that Mr. Boone, by his own admission, had no training as a law enforcement agent. His instructions from Agent Valente were to simply gather information, and leave the first meeting with Petitioner open-ended. Instead, Mr. Boone developed his own theory of where the "fine line" between innocent and unlawful overtures lay, and granted himself a "carte blanche" to do things he

would not otherwise have done if, in his independent estimation, Petitioner crossed that line. Petitioner was entrapped by an overly zealous amateur who disobeyed the instructions of the agent in charge of the investigation.

Against the factual background of Petitioner trying to find a safe haven for her group of 16 Iraqis, this is what Rudy Boone did:

He approached Petitioner, who had no idea what he wanted, and commiserated about the tragic plight of Iraqi Christians, personalizing the inducement with a poignant story of his refugee friend, "Tafique."

When Petitioner told him that she was trying to make legitimate arrangements with the Mexican government, Mr. Boone discouraged her, telling her how difficult this would be without U.S. visas.

Mr. Boone, again playing on Petitioner's anxiety about the situation in Iraq, suggested that American politics would cause the Middle East situation to flare up again, creating more problems for Iraqi refugees.

It was Mr. Boone, not Petitioner, who solicited a bribe. ("What's in it for me?" and "How much is this worth to you?"

It was Mr. Boone, not Petitioner, who set the amount of the bribe.

It was Mr. Boone, not Petitioner, who structured the time and place of future meetings.

As the Seventh Circuit noted in Hollingsworth, the stronger the inducement, the harder it will generally be for the government to prove that the defendant was independently predisposed to commit the crime. In this case, there was very little predisposition, short of Petitioner's generalized desire to keep

the refugees from being deported, persecuted and possibly killed, and an irresistible inducement offered by Mr. Boone.

Thus, Petitioner was not predisposed to commit the offenses charged prior to contact with Rudy Boone, as required to support a conviction under Jacobson v. United States. Furthermore, under Jacobson, as applied by United States v. Hollingsworth, Petitioner was simply not in a position to commit the crimes charged without government help. Stated differently, but for the creative intervention of Consul Rudolph Boone, Petitioner would not have committed those offenses.

Judge Ripple's dissenting opinion in United States v. Hollingsworth, supra, 27 F.3d at 1219, while misreading the import of Jacobson, does offer a persuasive reason why this Court should grant a writ

of certiorari:

> "This en banc proceeding sharply delineates the differences between the majority and the minority of this court on the issue of entrapment. It presents, in the most stark terms possible, two divergent views of the law of entrapment. More particularly, it presents a square difference of opinion among the judges of this court on the significance of the Supreme Court's opinion in Jacobson. It questions the continued vitality of Russell.The holding of the majority sets this circuit on a doctrinal course different from that of the other circuits. It presents, as the government notes in its petition for rehearing, a significant practical burden for law enforcement authorities. It is now for the Supreme Court to determine whether the doctrinal course that the majority has now set and the burden that it has imposed on law enforcement efforts are correct ones." (Emphasis added).

Petitioner contends that the Seventh Circuit's en banc majority decision in United States v. Hollingsworth, supra, correctly applies the entrapment analysis set forth by this Court in Jacobson v.

United States. Petitioner respectfully asks this Court to grant a Writ of Certiorari to the Sixth Circuit to resolve the conflict among the Circuits.

II. THE SIXTH CIRCUIT HAS COMPLETELY ABANDONED THE DEFENSE OF OUTRAGEOUS GOVERNMENT CONDUCT AS A VIOLATION OF THE DUE PROCESS CLAUSE, PUTTING IT IN CONFLICT WITH OTHER CIRCUITS AND WITH THE SUPREME COURT.

At trial and on appeal, Petitioner asserted that the government's conduct in this case not only constituted entrapment, but was so outrageous that it was a violation of the Due Process Clause.

The outrageous government conduct defense was first described in United States v. Russell, 411 U.S. 423, 431-432, 93 S.Ct. 1637, 1642, 36 L.Ed.2d 366

(1973).[17] In a later plurality decision, Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), the concurring opinion left open the possibility that an outrageous government conduct defense based on the Due Process Clause might be successfully invoked despite the unavailability of the entrapment defense due to predisposition. Id., 425 U.S. at 494-495.[18]

The Ninth, Tenth and Third Circuits have applied the outrageous government conduct/ Due Process analysis in reversing criminal convictions. See

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[17] In Russell, Justice Rehnquist noted that someday the Court might be presented with a situation "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Id., 411 U.S. at 431-432.

[18] In Hampton, at least six members of the Court in various plurality opinions recognized the potential availability of an outrageous governmental conduct defense regardless of the defendant's predisposition.

United States v. Solorio, ___F.3d___(9th Cir 1994)(No. 93-50507, rel'd 9-20-94); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Harris, 997 F.2d 812, 816 (10th Cir. 1993);[19] United States v. Twigg, 588 F.2d 373, 381 (3d Cir. 1978).

In the present case, the Sixth Circuit ostensibly applied a due process test set forth in United States v. Barger, 931 F.2d 359, 363 (6th Cir. 1991), and found the defense lacking under the facts of this case. However, as the panel noted in footnote 6 of its opinion (see Appendix, p. 23a), the Sixth Circuit in fact held, in United States v. Tucker, 28 F.3d 1420 (6th Cir. 1994), that as a matter of law, the defense of

[19] Harris was an entrapment case. The Tenth Circuit stated in dicta that an alternative ground for reversing the conviction was that the government's conduct approached being sufficiently outrageous to sustain a due process defense.

outrageous government conduct no longer exists. Rather, Tucker held, a defendant who challenges government inducement to crime is limited to the defense of entrapment, with its key element of predisposition.

The facts of this case, particularly the overreaching nature of the government's actions, have been set forth in the preceding argument and in the Statement of the Case. If the defense of outrageous government conduct exists, Petitioner is entitled to its benefit under these facts. She asks this Court to grant a writ of certiorari to the Sixth Circuit to resolve the clear conflict between its opinion in United States v. Tucker and the opinions of the Ninth, Tenth and Third Circuits, which in turn rely on this Court's language in United States v. Russell and Hampton v. United States.

CONCLUSION

WHEREFORE, Petitioner NEERAN ZAIA asks this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: December 1, 1994

FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

NEERAN ZAIA,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 93-1452, 93-1454

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appelle)
)
)
v.)
)
)
NEERAN ZAIA and HAZIM SAEEGH,)
)
Defendants-Appellants.)

Decided and Filed Sep 2, 1994

BEFORE: **KENNEDY** and **SILER**, Circuit Judges; and **BROWN**, Senior Circuit Judge.

PER CURIAM. Defendant Neeran Zaia was convicted by jury trial on three counts of bribery, seven counts of visa fraud, and one count of alien smuggling; she was sentenced to fifteen months of imprisonment. Her co-defendant Hazim Saeegh was convicted on one court of bribery and received a sentence of eight months. Zaia claims entrapment,

insufficiency of the evidence, and outrageous government conduct, as well as jury misconduct and, finally, error in the failure of the sentencing court to grant her request for a downward departure. Saeegh claims error in the sentencing court's failure to reduce his base offense level due to his mitigating role

in the offense.[1] We **AFFIRM** the convictions and sentences as entered by the district court.

Zaia, who is a former Iraqi citizen and a Chaldean Catholic, operates a

[1] The commentary to Guidelines section 3B1.2 on "Mitigating Role" provides that the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant." U.S.S.G. Section 3B1.2, comment. (n.1). Moreover, "a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." *Id.*, comment.(n.3).

travel agency in Detroit. In the wake of the Persian Gulf War, she contracted with other Chaldean Catholics living in Iraq or Jordan to help them escape from persecution and likely death at the hands of the Iraqi or Jordan to help them escape from persecution and likely death at the hands of the Iraqi Secret Police. She proposed to acquire Mexican or Canadian visas for her clients, charging up to $5000 per person for her expertise. She escorted a group of sixteen such persons from Amman, Jordan to the Dominican Republic in October 1991. Eventually, she obtained fraudulent United States visas for twelve of them and arranged for four others to travel to the United States by was of Mexico. The latter four eventually entered the United States illegally without visas, where they were

met by Appellant Saeegg and others.

Zaia had obtained World Service Authority (WSA) passports for the members of her group, but was unable to obtain visas[2] for these passports, since the WSA is a private organization whose passports are not recognized by any government. The United States Embassy in the Dominican Republic refused to issue visas for these passports. The group then traveled to Nicaragua and Guatemala, but had no better luck there. After failing in her attempts to acquire Mexican or United States visas for her clients, Zaia took the group to Belize in January 1992. There she approached Sue Williams, the owner of the motel where the group was staying, and asked for help contacting someone "at the embassy that could help them get visas to the United States." She suggested that she and Ms. Williams

[2] A visa is a government-issued stamp on a passport holder to visit or reside in the issuing country.

"both could make lots of money" if she acquired the proper contact. Williams contacted the United States Consul in Belize, Rudolph Boone, who was already aware of the Iraqis' presence. He testified at trial that he had learned from an earlier State Department cable that Zaia had already attempted to bribe a Guatemalan official in order to obtain visas for her group. When Boone informed Washington of what was transpiring, two special agents were sent to Belize City. Boone was "wired" to record his conversations and proceeded to approach Zaia and offer his assistance in obtaining visas for her group. All conversations between the two were recorded and later transcribed.

Their first meeting took place on February 5, 1992, at Mom's Restaurant, owned by Williams. Boone attempted to offer his services to Zaia. The

government contends that it was Zaia who first suggested paying Boone for the visas. In response to Boone's inquiry ("What's in it for me?"), Zaia stated that "[w]e're going to make money, you know." later Boone persisted by asking: "How much is this worth to you?"; and: "Well, what kind of money, what are we talking about?" It was only then that Zaia responded by specifically offering to pay for the visas. Zaia gave Boone four passports at that time, which eventually involved five fraudulent visas, resulting in the first five counts of the indictment, on which charges Zaia was acquitted. Zaia gave Boone money on February 5 and 6, and again on February 10, for which she was charged with four counts of bribery and also acquitted by the jury.

More meetings followed, with Zaia eventually paying Boone for twelve

fraudulent visas. Of these, she was convicted on charges stemming from the seven visas obtained for passports given to Boone on February 10 and 11, as well as on the bribery charges arising from the money she gave Boone on February 11 at two separate meetings. These transactions were also the basis for her conviction on the alien smuggling charge. Some of the twelve Chaldeans with visas then flew with Zaia to New Orleans, while the others flew to Houston. The four remaining members of the group had already been sent into Mexico and told to cross the Rio Grande River at night at a spot near Brownsville, Texas, where they met Saeegh and several of their relatives. Two of the four testified that it was Zaia's idea to send them into Mexico. Eventually, everyone traveled to Detroit. Boone also came to Detroit, where on February 20, 1992, he met with

Zaia and Saeegh and discussed expanding the fraudulent visa scheme to include more Iraqis who wished to leave their country. At that meeting, Saeegh requested Boone's help in an immigration petition for an elderly Iraqi woman. The next day, February 21, Zaia giving him the immigration file for the Iraqi woman. Zaia denies participating in this transaction, for which she received her final bribery conviction; Saeegh also received his single count of conviction, for bribery, on the basis of this meeting.

II.

The defendants raise several issues on appeal.

A. Did the district court err in denying Zaia's motion for judgment of acquittal because the government failed to prove beyond a reasonable doubt that she was not entrapped?

Zaia moved at the conclusion of the proof for a Rule 29 judgment of acquittal based upon the defense of entrapment as a matter of law. The district court denied the motion and submitted the entrapment issue to the jury. Entrapment as a valid defense has two elements: (1) "`government inducement of the crime,'" and (2) "`a lack of predisposition on the part of the defendant to engage in the criminal conduct.'" *United States v. Barger,* 931 F.2d 359,366 (6th Cir. 1991) (quoting *Matthews v. United States,* 485 U.S. 58, 63 1988)). For a court to find entrapment as a matter of law, the

> testimony and facts must be undisputed; a court may not choose between conflicting testimony or make credibility determinations. Furthermore, the undisputed evidence must demonstrate a "patently clear" absence of predisposition. If either of these elements is missing, then the predisposition question is for the jury to decide.

Id. (internal quotation marks omitted). In making this determination, all

evidence must be viewed in the light most favorable to the prosecution. *Id.*

"The question of entrapment `is generally one for the jury, rather than for the court.'" *United States v. Harris,* 9 F.3d 493, 497 (6th Cir. 1993) (quoting *Barger,* 931 F.2d at 366). However, "a defendant's predisposition must be proven beyond a reasonable doubt, and predisposition [is] the defendant's state of mind ***before*** his initial exposure to government agents." *United States v. Clark,* 957 F.2d 248, 250 (6th Cir. 1992) (internal quotation marks omitted) (emphasis added). "Where the government simply gives the defendant `an opportunity to commit a crime,' and the defendant accommodates by committing a crime, the entrapment claim is unavailable." *United States v. Kussmaul,* 987 F.2d 345, 349 (6th Cir. 1993) (quoting *Jacobson v. United States,* 112

S. Ct. 1535, 1541 (1992)). Moreover, "it has been held that the fact a government agent proposed an illicit transaction ... is insufficient to establish entrapment." *Barger,* 931 F.2d at 367.

Zaia cites to *Jacobson,* in which the Supreme Court found that the defendant had been entrapped, as well as the recent Seventh Circuit decision in *United States v. Hollingsworth,* 9 F.3d 593 (7th Cir. 1993), *vacated, reh'g en banc granted,* 1994 U.S. App. LEXIS 588 (7th Cir. Jan. 10, 1994) *Hollingsworth* relies upon *Jacobson* to support the distinction between a defendant's being "willing" to commit a crime, meaning that she desires the outcome of the imagined illegal act, and her being "ready" to commit that crime, meaning that she is prepared to take the steps necessary to complete the

actual crime. 9 F.3d at 598-99.[3] The case law in our circuit, however, is more in line with the *Hollingsworth* dissent's reliance upon *Jacobson* for the proposition that "predisposition is demonstrated by the defendant's `ready commission of [a] criminal act.'" *Hollingsworth,* 9 F.3d at 603-04, 1994 WL 236976, at *20 (Ripple, J., dissenting) (quoting *Jacobson*, 112 S. Ct. at 1541) (also citing *Kussmaul,* 987 F.2d at 349). In *Kussmaul*, we rejected the defendant's argument that *Jacobson* requires that "the Government's proof of predisposition must

[3]The original decision in *Hollingsworth*, 9 F.3d 593, was vacated and the case was heard en banc. The subsequent opinion nevertheless reached the same outcome as the original panel, but specifically stated: "We do not suggest that *Jacobson* adds a new element to the entrapment defense - 'readiness' or 'ability' or 'ability' or 'dangerousness' in top of inducement and ... predisposition." *United States v. Hollingsworth,* ___F.3d ___, 1994 WL 236976, *3 (7th Cir. June 2, 1994) (en banc).

be established with evidence obtained prior to its initial contact with the targeted individual." 987 F.2d at 348. We found no entrapment as a matter of law because the sting operation which ensnared the defendant "did not exhibit the persistent and overzealous Government pursuit of a reluctant and unresponsive individual over an extended period of time which so offended the *Jacobson* Court." *Id.* at 349.

The same logic applies to this case. A close reading of the transcript of the first meeting between Zaia and Boone indicates that, regardless of who first suggested that the visas could be obtained for money, Zaia very quickly warmed to the idea. She showed no reluctance whatsoever to break the law. In addition, a reasonable juror could conclude that Zaia had already indicated to Williams, as stated heretofore, that

she was willing to pay for United States visas and to offer a bribe to the United States Consul in order to obtain them.

Zaia argues that the strength of the government inducement, under the circumstances of impending deportation and possible execution for some or all of her clients, made it virtually impossible for her to resist the government's entrapment. Citing *Hollingsworth,* she argues that "the stronger the inducement, the more difficult it is for the government to prove predisposition." Zaia also points to evidence in her favor showing that she did in fact pursue various legal means on behalf of her clients, without success, prior to resorting to bribery.

Viewing all of the evidence in the light most favorable to the government, however, justifies, the inference that Zaia was not only predisposed to commit

the crimes for which she was convicted but was also planning to perpetuate her scheme of using fraudulent visas to enable other Iraqis to enter the United States, even after she had safely returned to Detroit with her sixteen clients, so that as she told Boone, "we're going to make money, you know," or as she told Williams, "we both could make lots of money." A reasonable juror could find from the evidence that Zaia was contemplating a continuing course of criminal activity. Such an inference undermines her entrapment defense.[4] The government presented sufficient evidence at trial to enable a reasonable juror to find beyond a reasonable doubt that Zaia

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[4] The government details other evidence to the same effect (e.g. the attempt to bribe a Guatemalan immigration official prior to arriving in Belize; the "inconsistent and false accounts she gave to various people" concerning her group's travel plans).

was not entrapped by government agents.[5]

B. Was there sufficient evidence to convict Zaia on the bribery charge stemming from the Detroit meetings?

"In addressing sufficiency of the evidence questions, this Court has long recognized that we do not weigh the evidence, consider the credibility of witnesses or substitute our judgment for that of the jury." *United States v. Hilliard,* 11 F.3d 618, 620 (6th Cir. 1993), *cert. denied,* 114 S. Ct. 1099 (1994). Our role is to determine whether *all of the evidence--* viewing it in the light most favorable to the government and drawing all reasonable inferences in

[5] Zaia also argues that the fact that she was acquitted on the earlier counts and convicted only on the later ones shows that the jury believed that she was not predisposed to commit these crimes from the beginning, prior to the influence of the government agents, but only became so after being induced into criminal activity by the government. We decline, however, to go behind the jury verdict in order to dissect hypothetical rationales for the jury's disposition of the various counts against Zaia.

the government's favor--could justify *any* rational trier of fact in concluding that which element of the crime has been proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). *See also United States v. Sturman*, 951 F.2d 1466, 1474 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992); *United States v. Head*, 927 F.2d 1361, 1365 (6th Cir.), *cert. denied*, 112 S. Ct. 144 (1991). If we determine that the evidence could justify such a conclusion, a claim based upon insufficiency of the evidence must fail. Moreover, the evidence presented by the government "need *not* remove every reasonable hypothesis except that of guilt." *United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984).

In this light, we reject Zaia's claim that she was "merely present" at the Detroit Meetings and did not

participate in the bribery scheme there. She was videotaped handing Boone the $500 pay-off money. Her appeal on this point, that the evidence is insufficient to support a reasonable jury's conclusion that she was guilty of bribery, is without merit.

C. Was the district court's failure to clarify the jury instructions on entrapment, when so requested by the jury, a violation of Zaia's constitutional rights?

Zaia failed to object to the jury instructions on entrapment at trial, so we review her claim here under the doctrine of plain error. The jury was given the Sixth Circuit Pattern Instruction 6.03 on entrapment, but during the course of its deliberations, it requested a clarification on the entrapment defense, which the district court refused to give. Zaia did not object to this refusal at that time. She now argues, however, that the entrapment

instruction was "misleading, or g[a]ve an inadequate understanding of the law." *See United States v. English*, 925 F.2d 154, 158 (6th Cir.), *cert. denied,* 501 U.S. 1210, 501 U.S. 1211 (1991) (internal quotation marks omitted). She argues that the pattern instruction was misleading in light of the *Jacobson* case, which was decided after our pattern instruction was written but prior to the trial in this case.

We cannot agree. The pattern instruction includes the following statement: "The crucial question in entrapment cases is whether the government persuaded a defendant who was not already willing to commit a crime to go ahead and commit it." *Pattern Criminal Jury Instructions of the Sixth Circuit* section 6.03(4) (West 1991). We do not see how *Jacobson* makes this instruction misleading or an inadequate

expression of the law, which is the test for the correctness of jury instructions. *English*, 925 F.2d at 158. It would be anomalous for us to find one of our own pattern instructions to be erroneous; this is especially true when the test here is whether the inadequacy of the instruction rises to the level of plain error, i.e., whether the error is "clear" or "obvious." *United States v. Olano*, 113 S. Ct. 1771, 1777 (1993).

"The trial court is vested with broad discretion in formulating its charge and will not be reversed unless the charge fails accurately to reflect the law." *English*, 925 F.2d at 158 (internal quotation marks omitted). The jury was told that it could convict Zaia only if it could find beyond a reasonable doubt that, despite the effects of government persuasion, she was "*already* willing to commit a crime." *Jury*

Instructions sections 6.03 (emphasis added). Such an instruction accurately reflects the law of entrapment, even with the gloss placed upon it by *Jacobson.*

D. Did the government engage in outrageous conduct in the investigation of Zaia?

The Supreme Court has held that it is possible for the conduct of law enforcement agents to be so outrageous as to violate a defendant's due process rights. *United States v. Russell*, 411 U.S. 423, 431-32 (1973). Such conduct must be so egregious as to violate fundamental fairness and to be "shocking to the universal sense of justice." *Id.* at 432; *see also United States v. Barger,* 931 F.2d 359, 363 (6th Cir. 1991). Whether or not a due process violation exists is a conclusion of law, which we review *de novo.* *See id.; United States v. Levy,* 904 F.2d 1026, 1029 (6th Cir. 1990) *cert. denied,* 498 U.S. 1091 (1991).

We have established a four-part test for outrageous conduct: "(1) the need for the police conduct as shown by the type of criminal activity involved, (2) the impetus for the scheme or whether the criminal enterprise preexisted the police involvement, (3) the control the government exerted over the criminal enterprise, and (4) the impact of the police activity on the commission of the crime." *Barger* 931 F.2d at 363.

The government points out that Zaia was the one who first approached Williams about making contact with an employee of the United States embassy in Belize (the "impetus" prong of the *Barger* test), and that Zaia on her own, without any government participation or knowledge, sent four of her clients into Mexico illegally, without, visas of any kind (the "control" and "impact" prongs). It was also Zaia who selected which

passports to give to Boone (the "control" prong); and it was Zaia who created the need for her illegal activities by bringing her clients to Belize without any realistic chance of obtaining legitimate visas for them (the "impetus" prong). The government argues that, in order to investigate Zaia's apparent interest in obtaining fraudulent visas, it had no choice but to present someone to be bribed, namely Boone (the "need" prong). We conclude that Zaia showed enough initiative in the conduct of the criminal activities at issue here to prevent our finding that the government conduct in this case was so outrageous as to "shock the universal sense of justice."[6]

---

[6] It should be noted that a recent Sixth Circuit panel decision has held, as a matter of law, that the defense of "outrageous government conduct" no longer exists. *United States v. Tucker*, ___ F.3d ___, 1994 WL 363882 (6th Cir. July 15, 1994). The *Tucker* court explained that a

E. Was it error for the district court to refuse to conduct an evidentiary hearing into allegations of jury misconduct and false statements made during voir dire?

Zaia makes two related claims of juror misconduct: (1) her due process right to a fair trial was violated because of ethnic prejudice against her on the part of certain members of the jury, and (2) these jurors lied during voir dire when they denied having any prejudice against the defendants. Zaia requests an evidentiary hearing concerning these matters. When a defendant makes an allegation of misconduct during jury deliberations, "[i]t is within [the trial judge's] discretion to determine what manner of hearing, if any, is warranted." *United States v. Wilson,* 534 F.2d 375, 379 (D.C.

defendant who now relies on the defense of inducement is "limited to the defense of entrapment and its key element of predisposition." *Id.* at *7.

Cir. 1976). Zaia bases her claim on a letter sent by juror Trudy Miller to defense counsel, which states in pertinent part: "I heard many statements in that room that sounded prejudice [sic], and of course they denied it!" Both parties agree that F.R.E. 606(b), concerning inquiry into the validity of a verdict, precludes a juror's testimony and also a juror's affidavit or statement regarding "any matter or statement occurring during the course of the jury's deliberations," except with regard to "extraneous prejudicial information" or "outside influence...improperly brought to bear."

The government argues convincingly that the two stated exceptions are the only ones recognized as allowing for the possibility of an evidentiary hearing concerning the validity of a verdict. The allegations of prejudice made by

juror Miller do not fall within either of these exceptions. The Supreme Court ruled in *Tanner v. United States,* 483 U.S. 107 (1987), that the district court had not erred by refusing to hold an evidentiary hearing concerning a juror's post-verdict allegations accusing other jurors of alcohol and drug abuse during the course of the trial and the jury deliberations. In the same vein, the Seventh Circuit in *Schillcutt v. Gagnon,* 827 F.2d 1155 (7th Cir. 1987), reiterated the importance of protecting the "fruitful exchange of ideas and impressions among jurors" by assuring them that their comments "will not reach a larger audience." *Id.* at 1159. Only in cases of the "extremely rare abuse" that has denied a juror her due process right to a fair trial will an evidentiary hearing be required. In *Shillcutt,* the following statement was made by a juror

about the defendant and reported by a fellow juror: "Let's be logical; he's a black, and he sees a seventeen year old white girl--I know the type." The court held that this did not amount to the type of "prejudice pervad[ing] the jury room" that would necessitate an evidentiary hearing. *Id*. In the case at hand, there is even less evidence of actual prejudice against the defendant Zaia. Juror Miller heard statements that "sounded [like] prejudice." We decline on that basis to interfere with the sound discretion exercised by the district court in denying Zaia's motion for an evidentiary hearing regarding jury misconduct.

Zaia also claims the district court erred in denying an evidentiary hearing based upon false answers to voir dire questions. In *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981), we stated that an evidentiary hearing on a juror's

alleged failure to disclose information during voir dire will be held only if the movant "has presented a sufficient evidentiary basis to raise a fact issue of prejudice, "*id.* at 659, and that "the allegations in the moving papers must be sufficiently *specific, detailed, and nonconjectural* so that fact issues are raised." *Id.* at 659 n.9 (emphasis added). *See also Marks v. Shell Oil Co.*, 895 F.2d 1128, 1130 (6th Cir. 1990).

In the case at hand, Zaia has failed to point to the specific and nonconjectural fact issues required as a basis for granting her motion for an evidentiary hearing. The only basis for her claim is the highly speculative inference, drawn by a single juror, that her fellow jurors harbored racial and ethnic prejudice against the defendants. The accusing juror admits, however, that her fellow jurors, when confronted,

denied the allegations of prejudice. We will not disturb on such an insubstantial basis the district court's exercise of discretion in denying Zaia's request for an evidentiary hearing regarding voir dire impropriety.

F. Was it error for the sentencing court to fail to use its discretionary authority to grant Zaia's request for a downward departure in her sentence?

"A district court's failure to depart from the Guidelines range is not cognizable on appeal...when the district court properly computes the Guidelines range, imposes a sentence that is not illegal or did not result from an incorrect application of the Guidelines range, and is not unaware that it had discretion to depart from the Guidelines range." *United States v. Brannon*, 7 F.3d 516, 521-22 (6th Cir. 1993). Zaia argues that the district court was unaware that it possessed the discretion to depart form the Guidelines based upon section

5K2.11, which allows a downward departure when "a defendant [has committed] a crime in order to avoid a perceived greater harm." The sentencing court did, however, consider the possibility of a departure under section 5K2.11, but rejected it because "it isn't the kind of departure that 5K2.11 is talking about, number one. And, number two, because it was of a continuing nature. That she still met and tried to initiate or to be part of bribery, it kind of offsets that." Zaia's appeal on this issue is therefore without merit.

D. Was it error for the sentencing court to fail to reduce Saeegh's sentencing level due to his mitigating role in his offense of conviction?

Saeegh argues on appeal that the district court's failure to reduce his base offense level due to his mitigating role in the offense, pursuant to U.S.S.G section 3B1.2, was clear error, as was its failure to make specific factual

findings regarding a matter in the presentence report to which he objected, pursuant to Fed. R. Crim. P. 32(c)(3)(D). "The district court's findings of fact regarding whether [defendant] is entitled to [a] reduction will be reviewed only for clear error. Defendant must prove by a preponderance of the evidence that he is entitled to the reduction." *United States v. Moss*, 9 F.3d 543, 554 (6th Cir. 1993) (citation omitted).

Saeegh argues that the district court's failure to decrease his offense level contradicts various statements it made at the sentencing hearing to the effect that "Ms. Zaia was the organizer -- she was the supervisor to a great extent," and that "[Saeegh's] role was substantially less than the other defendant in relation to the criminal activity." On the other hand, the district court also found that Saeegh

"to some extent--in relation to this particular [i.e., apparently, in relation to the activity forming the basis for his sole count of conviction]- was motivated by the fact that he *did know* what was happening. I don't think there's any question about it." (Emphasis added). Earlier, the district court found that "there's nothing in the testimony or otherwise that would lead the Court to believe that he's entitled to either anything mitigating or anything for increasing."

The district court ostensibly relied upon the videotape of Saeegh handing the immigration file to Boone on February 21, 1992, recorded in Boone's Detroit hotel room, as well as upon Boone's testimony regarding Saeegh's involvement, during Boone's Detroit visit, in the attempt to obtain a fraudulent visa by offering Boone a bribe. The government argues

that the district court's statements referred to by Saeegh concerned his role in the overall scheme to help the Chaldeans enter the United States illegally, which role was admittedly "substantially less" than that of Zaia, but that the court also found that Saeegh's role in the single count for which he was convicted did not warrant a mitigating role reduction. We agree. Although the district court could have more clearly stated the factual basis for its conclusion that Saeegh was not entitled to a reduction, it did find that Saeegh had knowledge of the "particular matter" involving his count of conviction and based its decision, at least in part, upon that finding.

The testimony of Boone established that Saeegh "seemed very well acquainted with all the events" involving the twelve Iraqis constituting Zaia's group in

Belize, and that Saeegh participated roughly as an equal with Zaia in the discussions concerning the immigration file at issue in his count of conviction, although Saeegh rightfully points out that Boone was unsure as to many of the specifics of Saeegh's involvement in these discussions. There is apparently no dispute that Saeegh did in fact hand Boone the immigration file, for which he sough special treatment, shortly before he was arrested. Under a different set of circumstances, we have held that a sentencing court's factual finding concerning the quantity of drugs to be counted against a defendant is "adequate" even when limited to the single statement that "`I think the jury chose to believe the former [explanation of what the defendant had done] and I think that is a reasonable determination.'" *United States v. Todd,* 920 F.2d 399, 408 (6th

Cir. 1990). Accordingly, we find that the sentencing court in the case at hand also made an adequate factual finding in rejecting Saeegh's request for a reduction in his sentencing level.

Finally, Saeegh has failed, on appeal and apparently also at the district court, to point to any factual matter to which he objected in the presentence report. His resort to Fed. R. Crim. P. 32(c)(3)(D) is therefore unavailing. Essentially, as the government asserts, he is arguing that the district court failed to make an adequate factual finding concerning the mitigating role issue. We addressed that argument above and found it insufficient to require resentencing for Saeegh.

III.

For the reasons stated above, we **AFFIRM** the convictions and sentences of both appellants, as entered by the district court.

UNITED STATES DISTRICT COURT

EASTERN District of **MICHIGAN**

HONORABLE BERNARD A. FRIEDMAN

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
(For offenses Committed On or After November 1, 1987)

V.

NEERAN ZAIA Case No. 92-CR-80137-01-DT

(Name of Defendant) **DAVID ESPER**
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s)
[x]was found guilty on count(s)6 thru 12, 17, 18, 19, 20/SS INDICTMENT after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	**Nature of Offense**
18:USC:1546(a)	VISA FRAUD
18:USC:201(b)(1)	BRIBERY
8:USC :1342(a)(1)(D)	ALIEN SMUGGLING

Date Offense Concluded	**Count Number(s)**
1-92	6,7,8,9,10,11,12
1-92	17, 18, 19

1-92 20

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[x] The defendant has been found not guilty on count(s) 1 through 5, 13, 14, 15, 16, and is discharged as to such count(s).
[x] Count(s) 21 (is) ~~(are)~~ dismissed on the motion of the United States.
[x] It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 6 thru 12, 17 thru 19 and 20, which shall be due [x] immediately [] as follows: **for a total of $550.00**

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 379-88-2533

Defendant's Date of Birth: July 1, 1963

Defendant's Mailing Address:

Defendant's Residence Address:

3767 Barq Drive
Sterling Heights, Michigan 48310

MARCH 10, 1993
Date of Imposition of Sentence

/s/
Signature of Judicial Officer

BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

MAR 15 1993
DATE

Defendant: NEERAN ZAIA
Case Number: 92-Cr-80137-01-DT
Judgment-Page __2__ of__5__

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of
Fifteen (15) months on each Count 6, 7, 8, 9, 10, 11 and 12
Fifteen (15) months on each Count 17, 18, 19
Fifteen (15) months on Count 20

All terms of incarceration are to run CONCURRENT with each other

[] The court makes the following recommendations to the Bureau of Prisons:

[]The defendant is remanded to the custody of the United States marshal
[]The defendant shall surrender to the United States marshal for this district. **The court granted defendant's motion for bond pending appeal**
[]at_____am/pm on _____
[]as notified by the United States marshal.
[]The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
[]before 2 p.m. on_____
[]as notified by the Unites States marshal.
[]as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____to_____
at_____,
with a certified copy of this judgment.

_____
United States Marshal

By_____
Deputy Marshal

Defendant: NEERAN ZAIA
Case Number: 92-Cr-80137-01-DT
Judgment-Page 3 of 5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Two (2) years on each count: Counts 6 thru 12, 17, 18, 19, and 20 all terms of supervised release are to run CONCURRENT to each other

While on supervised released, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[x]The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[]The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[x]The defendant shall not possess a firearm or destructive device.

14. The defendant shall abide by all standard conditions of supervised release as outlined below and adopted by the court.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer.

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or

administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probate officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer; the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: NEERAN ZAIA
Case Number: 92-CR-80137-01-DT
Judgment- Page 4 of 5

FINE

The defendant shall pay a fine of $_____. The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

The court waives all fines and costs of incarceration, find the defendant unable to pay

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:
[ ] in full immediately.
[ ] in full not later than _____
[ ] in equal monthly installments over a period of_____months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

Defendant: NEERAN ZAIA
Case Number: 92-CR-80137-01-DT
Judgment- Page 5 of 5

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): **for the 8 level increase pursuant to 2C1.1(b)(2)(B)**

Guideline Range Determined by the Court:

Total Offense Level: 14

Criminal History Category: I

Imprisonment Range: 15 to 21 months

Supervised Release Range: 2 to 3 years

Fine Range: $4,000.00 to 40,000.00

[x] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $_____

[ ] Full restitution is not ordered for the following reason(s):

[x] The sentence is within the guideline

range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[] upon motion of the government, as a result of defendant's substantial assistance.

[] for the following reason(s):

U.S. DEPARTMENT OF STATE

BUREAU OF DIPLOMATIC SECURITY

SUBJECT: BOONE/ZAIA, BELIZE CITY

CASE No.: D56-15989

SA/CI: ROBERT VALENTE

FEBRUARY 5, 1992

MORNING MEETING

MR. VALENTE: This is special agent Robert Valente, DSI/CR. The time is 10:30 a.m. on February 2, 1992. The place is the American Embassy, Balize City, Balize. We are testing Panasonic recorder, model number RN 36, serial number XEOIC 14562. The counter reading is 005.

The following is a consensually monitored conversation between American Embassy Balize Consul, Ruby Boone and Niran (Nancy) Zaia.

Mr. Boone, do we have your consent to tape your conversation with Miss Zaia?

MR. BOONE: Yes, you have my full consent to tape the conversation.

MR. VALENTE: The time is 10:44 a.m. on [011] February 5, 1992. The conversation will take place at Mom's Restaurant in Belize City, Belize. The

counter reading is 010.

MR. BOONE: Hi Sue, how're you doing? (inaudible) Mi, Miss Zaia? Is Nancy Zaia? This is,

MS. ZAIA: Yes.

MR. BOONE: Hi, I'm Mr. Boone. Can I talk with you a bit?

MS. ZAIA: Yeah, okay.

MR. BOONE: Can we go... I don't know Here; it doesn't matter. Maybe in the back? Hi, Kimberly.

MS. ZAIA: Okay. Regarding?

MR. BOONE: Well, can I -- Shut this door?

MS. ZAIA: We can go in my room it's okay.

MR. BOONE: I've gotten work from some people that you're here.

MS. ZAIA: Okay.

MR. BOONE: And I wanted to talk to you about your situation.

MS. ZAIA: Situation? What kind of

Situation?

MR. BOONE: My friend out at the airport says that you have a group here.

MS. ZAIA: Okay.

MR. BOONE: Can we close the door?

(Whereupon the door was closed.)

MR. BOONE: And um, you might need some help and I was wondering what that was. I am the counsel, the chief of the section.

MS. ZAIA: Okay.

MR. BOONE: And ah, that's it.

MS. ZAIA: You mean if I need help, you mean, you can help?

MR. BOONE: With your group, ah --

MS. ZAIA: Well most of them, they like to stay here.

MR. BOONE: Uh-hmm, they want to stay here?

MS. ZAIA: Yeah. So they need do some favor for them. Some people they like to buy Belize passport because they

like to
go and come back. Because if they go to Jordan, it's hard to come back here.

MR. BOONE: Uh-hmm.

MS. ZAIA: Because why? Because they have passport Iraqi. They don't listen to come any time they want.

MR. BOONE: Yeah.

MS. ZAIA: They do investment here or they do anything here, they need -- something to go and come back easy. Like any time, like, you mean, the first time it's too hard to get visa to them because they are Iraqi.

MR. BOONE: Yeah.

MS. ZAIA: Yeah. They don't get visa, Because Mousa, Said Mousa, I talk to him because his mom, she knows me, I'm part Palestinian, so we are cousins, my second cousin. I mean, they know my mother.

MR. BOONE: Your cousins, yeah.

MS. ZAIA: Yeah, So they guy he help me - MR. BOONE: Not Israel, but Palestine.

MS. ZAIA: Yeah.

MR. BOONE: Yeah, okay.

MS. ZAIA: So the guy help me to get the visa here it's no problem. But most of the people they say, I mean, this is hard, you cannot get passport just because they ask for a lot of money. I have to give --

MR. BOONE: You mean the economic citizenship?

MS. ZAIA: Yeah, they issue to them.

MR. BOONE: Yeah.

MS. ZAIA: They issue to them. I talk with what they call Saris, what's his name?

MR. BOONE: Abounara (ph.)

MS. ZAIA: Abounara, yeah. He's very nice guy. I talk to him. I like to

help you, but the government, they have to pay $25,000.00. If they pay $25,000.00 they have a different life, I mean. Very nice place they saw before Dominican Republic.

(Inaudible) without this money.

MR. BOONE: Yeah.

MS. ZAIA: It's by the law.

MR. BOONE: You can buy the business and do this and that?

MS. ZAIA: Right away and after six months then I give you whatever you want. So, you know a lot of pressure and a lot of stories.

MR. BOONE: Yeah.

MS. ZAIA: About your idea? What do you think you can help these people?

MR. BOONE: Well, I'm leaving here soon.

MS. ZAIA: When you going?

MR. BOONE: I'm leaving here, - I'm going to another post on a new assignment

--

MS. ZAIA: Okay.

MR. BOONE: -- and, ah so I, - my interest for this job is dwindling daily and --

MS. ZAIA: I know everybody here, even in government.

MR. BOONE: -- I have been told by a friend and --

MS. ZAIA: They met someone here?

MR. BOONE: -- he has met you at the airport and I've --

MS. ZAIA: You can help them for --

MR. BOONE: I believe I can.

MS. ZAIA: to issue passport?

MR. BOONE: I believe I can.

MS. ZAIA: You can?

MR. BOONE: Yes. I have, by the way, I have a lot of friends that -- let me finish, let me finish, from Lebanon, okay. One of my best friends when I was in the State Department in Washington was

a lawyer, a Lebanese lawyer named Kafuri (ph.) Tafique Kafuri (ph.); do you know that name?

MS. ZAIA: Kafuri yeah. I know, I know the last name.

MR. BOONE: Well, Kafuri's all over the place.

MS. ZAIA: All over, yeah.

MR. BOONE: And from Tafique's situation, and he came to Washington as a displaced, stateless person, so I know what that's about, okay. We have problems here with a lot of Chinese coming in and I watch the Chinese.

But I understand, I think, the Middle East situation and the different way because of Tafique and ah, and he's used to say he was a warrior, you know, he was a Christian and how difficult it is in that part of the world to live because he came from a fine family. His father was a doctor; he was a lawyer, you

know. He had to practice law for King aud (ph.) in Saudi Arabia for two years, and so, there is this understanding, this feeling.

So, if I can help you, let me know, and ah --

MS. ZAIA: Yes, I need your help, but what

kind like -- tell me truth, because you know what? I like to help these people.

MR. BOONE: Well, you tell me. What do you need?

MS. ZAIA: If you need me, if you wan, you mean, I know that you said you're going to leave, I mean --

MR. BOONE: No, I'm not leaving until June.

MS. ZAIA: I know.

MR. BOONE: This is al confidential.

MS. ZAIA: Every month, I got different group. These people when they come here, they like to go every month.

Somebody they like to go to the Canada; Somebody they like to go the Mexico; somebody they like to go to the U.S.A. Somebody, they like to stay here, you know. Each people is different.

MR. BOONE: And every month --

MS. ZAIA: Every month, yeah.

MR. BOONE: Well, I don't know about that, but, hey, you know --

MS. ZAIA: Yeah. But I;m a travel agency. I try to help everybody and I can't do that. When I talk with the lawyer here, you know, Margaret, Said's sister, the lawyer, when I talk to her, she said she had a talk with Embassy in Mexico and she (inaudible) and -- maybe she can get a visa for them. Some people they can ...

MR. BOONE: Yeah, well, you see the problem there is that to get a Mexican visa okay, if you tell them you're going to -- they want to know where you're

really going to go and then they have a tendency to send people away without Mexican visas and say go to the U.S> consular section and get a visa and then come back; get a U.S. visa and then we'll give you a Mexican visa, so even that's hard.

MS. ZAIA: I know.

MR. BOONE: See, without the U.S. visa. And this is the problem Tafique had. I mean, he had problems getting his brother out and I helped his brother, Nicholas, who went to dental school in Philadelphia.

MS. ZAIA: (Inaudible). I know sometimes it's had to get the visa to them.

MR. BOONE: Yeah.

MS. ZAIA: So what are you going to do for them, either passport, either visa, either. They can get a job anywhere they want. I don't care. It's

not my business --

MR. BOONE: Yeah.

MS. ZAIA: -- where they get the job. What if they don't have no choice? What are they going to do?

MR. BOONE: Well, what's -- let's be for real, okay. What's in it for me? Now, I'm leaving here and --

MS. ZAIA: I know, but --

MR. BOONE: -- and everybody thinks --

MS. ZAIA: I don't know what are you going to do for me. Just, - I told you what the situation.

MR. BOONE: But do you need visas?

MS. ZAIA: I hope so.

MR. BOONE: I could help you.

MS. ZAIA: And I appreciate it. This is business. We're going to make money, you know.

MR. BOONE: This is business.

MS. ZAIA: This is business.

MR. BOONE: To me, it would be a business.

I have, - I mean, I understand Tafique's situation, but I put my career --

MS. ZAIA: I don't know the first, - your name.

MR. BOONE: Rudy, Rudy.

MS. ZAIA: Rudy?

MR. BOONE: Rudy.

MS. ZAIA: Rudy, my name is Nancy. This

is business for others because I help many, many people in the Middle East. They need help. They need to run away. They need me.

MR. BOONE: I don't know about all of that.

MS. ZAIA: I know.

MR. BOONE: Okay?

MS. ZAIA: No, no, but you heard what's going on between -- Bush and Saddam what's going on, what's happened

to all the people.

MR. BOONE: And it's going to flare up again. Bush is going to need another confrontation with Sadam --

MS. ZAIA: They going to start --

MR. BOONE: -- for the election.

MS. ZAIA: The people, they need to sell the (inaudible). Well, they're not going to stay until they kill them a lot of people, I mean, every family they have, two or three people (inaudible).

MR. BOONE: Well --

MS. ZAIA: Visa or passport, you know somebody, they say they can drive and take them anywhere they want. I don't care.

MR. BOONE: You see, I have been working with the Chinese. I'm interested in Chinese, that's what I'm -- Chinese and Indian.

MS. ZAIA: Chinese is easy, It's not like these people.

MR. BOONE: No, no, no, the Chinese are very different. They don't get into the society as much. They keep to themselves so they never become American. See, that's my thing.

MS. ZAIA: Yeah.

MR. BOONE: When you say monthly, I don't know, see.

MS. ZAIA: I get monthly because this is my job. I have to finish from these people then I have to go back to the

Jordan and bring the other people.

MR. BOONE: Okay, well, I'm the chief of this section, so there's nobody beyond me. Everything comes through me.

MS. ZAIA: That's good.

MR. BOONE: Okay? But at the same time, I'm not going to jeopardize my career just -- if you talk to anybody -- and they thing is, I lived in Balize for two years. I know people talk --

MS. ZAIA: I know.

MR. BOONE: You call Saaed, Saaed will call --

MS. ZAIA: No, no, this is if you -- this is a group, listen, everybody they know. Most of them they gone.

MR. BOONE: Yeah.

MS. ZAIA: I have the group, they gave already they go back to Santa Dominica but they cannot do nothing to them. I'm honest with you. I have just a few left. A few left, so if you can do something

just between us, even if you can go back to the America. If you like, it you like to work with me, we're going to work together. Even Said, I don't need him. Like I said --

MR. BOONE: You can't trust anybody here.

MS. ZAIA: I know, I know.

MR. BOONE: You know --

MS. ZAIA: I got knowledge now.

MR. BOONE: Yeah. Okay.

MS. ZAIA: We gotta do, - even lawyer, I don't need lawyer. We -- just show me where you gonna do it, but even if you go to the United States (inaudible) the people from Jordan, they send me all the passports to me I send them to here. To get them visa. (inaudible). Then I send them back to Jordan.

MR. BOONE: This is an Iraqi passport or Belize passports?

MS. ZAIA: No. I talk about Iraqi.

MR. BOONE: Iraqi.

MS. ZAIA: If you can make it Belize passport, ooh, it's good. You can do that?

MR. BOONE: Well, I know people who can because I've been working the other end for so long that I know --

MS. ZAIA: You have the Belize?

MR. BOONE: I know people who can. I'll give you a number and you take it.

MS. ZAIA: I don't want. If they can do it... you I don't want to go and ask. I ask all of the guy. They ask for big money. How the gonna give them.

MR. BOONE: Big money.

MS. ZAIA: No way because

MR. BOONE: Well, I'll tell you what. If you can show me some good faith, I will do, too, and I'll see two or whatever, and we'll see how it goes.

My problem is I have to do them within the course of the day because I have to do the end of the day tally sheets and what I have to do is figure out how to register an Iraqi as a non-Iraqi on my sheet.

MS. ZAIA: Yeah.

MR. BOONE: It'll show as a Balizian, but I have to do that before my accountant takes it. Because it's a very

controlled system; that's the problem.

MS. ZAIA: I know.

MR. BOONE: See, so --

MS. ZAIA: So what do you want me to show you?

MR. BOONE: Well, you want to work?

MS. ZAIA: Well, why not? I like to believe me, believe me I'm honest with you. I like to -- I mean --

MR. BOONE: But you can't call me at home.

MS. ZAIA: No.

MR. BOONE: And you can't call me. I don't know how we can get in contact.

MS. ZAIA: Well, call me here.

MR. BOONE: Because you know the Embassy phone --

MS. ZAIA: Okay. You know what, you know, just give me a call anytime you want, say Nancy, I want to see you, downstairs

MR. BOONE: Okay, Now, maybe that's

a problem 'cause everybody knows me. I mean, I'm well known, you see. I'm well known for going against all these -- well, Chinese. Everybody says I hate Chinese. I don't hate Chinese. But the Chinese, there's so many more of them.

MS. ZAIA: No, but there's nobody that cannot complain to you because (inaudible) a whole lot of friends (inaudible). We can do that.

MR. BOONE: How much is this worth to you?

MS. ZAIA: I don't know what you gonna do to them. Because I don't know what you're gonna do.

MR. BOONE: Well, if you want visas, if that's what you want --

MS. ZAIA: Visas to where?

MR. BOONE: To the U.S.

MS. ZAIA: You can do to U.S.?

MR. BOONE: Yes.

MS. ZAIA: Oh my God, How long that

take?

MR. BOONE: I've gotta do it within the course of the day because if the reconciliation, see; the numbers have to be -- it's an easy process. And the thing about why people don't realize how easy it is, is that we don't keep records of the issuances beyond six months.

MS. ZAIA: So you work with the U.S. Embassy now.

MR. BOONE: I'm the chief of the section.

MS. ZAIA: Oh, my God.

MR. BOONE: I am the consul --

MS. ZAIA: For the --

MR. BOONE: Yeah, I have been over here. I've been scoping you out, okay, so you
know that, I mean, you know. I wanted to get a sense of --

MS. ZAIA: (Inaudible).

MR. BOONE: You don't talk to Sue,

you don't talk to Sue.

MS. ZAIA: No, she don't know nothing.

MR. BOONE: Because in Belize, this is where you talk to Saaed, Saaed's going to talk to everybody else.

MS. ZAIA: No, Saaed, no. I told him I need to bring people here to invest them some money and they going to do this and that.

MR. BOONE: Yeah.

MS. ZAIA: So, you, what are you going to do? How long it gonna take visa for them?

MR. BOONE: Well, what kind of money; what are we talking about?

MS. ZAIA: If you gonna get the visa, if you get the visa because this is A group.

MR. BOONE: Yeah.

MS. ZAIA: Like 15-16 people.

MR. BOONE: Go ahead.

MS. ZAIA: Okay, so what do you think it's worth to get them? I got 11, I got 11 today, I got 11.

MR. BOONE: Here?

MS. ZAIA: Yeah, with me, 11.

MR. BOONE: I've never done this before, so.

MS. ZAIA: I know. I got 11. See what you're gonna do. See how much you need. I'm ready to pay any --

MR. BOONE: How about $300.00 a piece? You're talking about multiple.

MS. ZAIA: I know, I know.

MR. BOONE: So that they come and go.

MS. ZAIA: Three hundred, Belize or America?

MR. BOONE: America, U.S. This is a multiple --

MS. ZAIA: Okay, how long it gonna take?

MR. BOONE: I have to close up my

books

by 4:30, 5:00.

MS. ZAIA: You gonna let me know? Okay.

MR. BOONE: I can -- if you want me, I have to start the process.

MS. ZAIA: Okay, go ahead, start.

MR. BOONE: See, we are -- this is why I can't stay long because I'm the chief of this section.

MS. ZAIA: But there's no problem for visa to they go to the America?

MR. BOONE: What?

MS. ZAIA: There's no problem?

MR. BOONE: No, they hop on a plane. They don't have -- see, with the U.S. visa they don't even have to go through Mexico by road.

MS. ZAIA: You can go to the Miami?

MR. BOONE: You put them on Taca (ph.), you put them on American Airlines, blah, blah, blah.

MS. ZAIA: Okay. So you're going to do visa and passport Iraqi?

MR. BOONE: Yeah.

MS. ZAIA: Okay.

MR. BOONE: If you give them to me, - give me two and I will bring back visas and then we will --

MR. ZAIA: You need two passports?

MR. BOONE: Well, we'll start off with two. I'm going to see how it plays because my secretary goes over my reconciliation and if she sees any problem, okay, she won't see the Iraqi passport, therefore, she will see just two notes to the effect that these passports -- they will be recorded as Balizian.

MS. ZAIA: Okay, I know, I understand.

MR. BOONE: Okay, yeah.

MS. ZAIA: Okay, let's go downstairs. We'll make some coffee and

then I'm going to bring you two passports.

MR. BOONE: Go downstairs, okay. You don't say a work to Nancy, Okay?

MS. ZAIA: I know, I know, believe me, believe me, honest. You mean, give me a promise you are honest with me. I don't want nobody to play games with me.

MR. BOONE: Your people will go. I am the chief of the section, okay.

MS. ZAIA: I don't know you.

MR. BOONE: No, I'm the chief of the section see. All right.

MS. ZAIA: But why you scared to give me your home number.

MR. BOONE: Because my phone is hooked into the Embassy.

MS. ZAIA: Okay.

MR. BOONE: See?

MS. ZAIA: But in the future, if I like to call you from America what do I do? If I talk to you like hi, how are

you; how's everything?

I told you -- I told you all my job. They got to send you, two T-shirts. (inaudible).

MR. BOONE: I have a girlfriend, okay.

MS. ZAIA: When I hold her I need to talk with Rudy and you mean --

MR. BOONE: Yeah, she -- yeah, and then I will go back and I will call you back from her house.

MS. ZAIA: Call me collect anytime you want to. I give you my number, I give you everything.

MR. BOONE: Okay, I don't plan to stay in the foreign service long and --

MS. ZAIA: And also if you --

MR. BOONE: Well --

MS. ZAIA: Can do something, I mean I got on she had a big baby few months ... I need to do, to help.

MR. BOONE: Okay, I gotta get back.

MS. ZAIA: You come downstairs. Follow me.

MR. BOONE: Yeah, where's my sunglasses? Okay, We'll see you; it was nice talking with you.

[Conversation with 3rd person]

MS. ZAIA: Okay. What do you want to drink?

MR. BOONE: Just a coke because I have to get back.

MS. ZAIA: What do you like to drink; tea, hot tea?

MR. BOONE: Where are you from? Zaia: America No, where were you born?

MS. ZAIA: My mom was from Palestine and my dad was from Lebanon.

MR. BOONE: Lebanon.

MS. ZAIA: I've been in America about 15 years.

MR. BOONE: You know, I spent 15 of my years before I got married with a sabra, a Jewish woman.

MS. ZAIA: Jewish?

MR. BOONE: Yeah, and that was an interesting experience. Then things started changing because her parents had been in the Holocaust and we would talk about that, you know, but I will get to Israel or Palestine.

MS. ZAIA: Give me your phone number, all right?

MR. BOONE: Let me ask her first. I haven't asked her.

MS. ZAIA: (Inaudible)

MR. BOONE: Is this it here? Okay.

MS. ZAIA: Because I have to --

MR. BOONE: Well, let me see how the two go. I have to figure out the reconciliation.

MS. ZAIA: (Inaudible). Oh, my God.

MR. BOONE: Next year in Jerusalem, as they use to say. You know that? You know that the Jewish saying next year in Jerusalem?

MS. ZAIA: So where are you going to go?

MR. BOONE: I'm going to Manila.

MS. ZAIA: Where's that?

MR. BOONE: The Philippines.

MS. ZAIA: Oh, Philippines. Oh, you gonna work there in the Philippines?

MR. BOONE: Yeah.

MS. ZAIA: Maybe you can do something there.

MR. BOONE: Well, there are a lot of -- yeah.

MS. ZAIA: (Inaudible). They are good people. You will take care of them. (Inaudible).

MR. BOONE: Now, the visa will have my name on it, by the way.

MS. ZAIA: Your name?

MR. BOONE: You know the slug (inaudible)?

MS. ZAIA: I know. (Inaudible).

MR. BOONE: I'm a bit nervous. I'm

a bit nervous.

MS. ZAIA: No.

MR. BOONE: No?

MS. ZAIA: It's easy. You know, I got one guy in Jordan who help me a lot. He give me a visa for two of my relatives (inaudible).

MR. BOONE: I have friends that do it all the time and our thing is we have a lot of what we call, you, know discretion. We can make decisions as a consul.

Anyway, do you have the two for me?

MS. ZAIA: She gonna bring it to me.

MR. BOONE: Okay.

MS. ZAIA: (Inaudible).

MR. BOONE: It's not going to be a big package?

MS. ZAIA: no.

MR. BOONE: It's not going to be a big package; it's not going to be a big package?

MS. ZAIA: No.

MR. BOONE: This is why I picked up a little magazine. I will get -- you know what we talked about this afternoon?

MS. ZAIA: Yeah. So when will I see you again?

MR. BOONE: Call me after 5:00. Shall I call you here?

MS. ZAIA: Yeah, give me a call upstairs.

MR. BOONE: Okay.

MS. ZAIA: Just give me a call, tell them I want to see you. (Inaudible)

MR. BOONE: By the Ramada? Yeah.

MS. ZAIA: You know where?

MR. BOONE: Yeah.

MS. ZAIA: Okay. Meet me there.

MR. BOONE: At the Ramada.

MS. ZAIA: Not the Ramada.

MR. BOONE: Fort George Hotel? No?

MS. ZAIA: (Inaudible).

MR. BOONE: Oh, with that swimming

MS. ZAIA: Yeah, with the swim pool.

MR. BOONE: The Villa?

MS. ZAIA: Villa, yeah.

MR. BOONE: Okay, all right.

MS. ZAIA: You see me there.

MR. BOONE: What time?

MS. ZAIA:It depends what time you--

MR. BOONE: Well, I want to go home and change. Six, 6:30?

MS. ZAIA: Six-thirty, that's when I'm going to be there, okay?

MR. BOONE: Okay.

MS. ZAIA: (Inaudible).

MR. BOONE: How do you say hello in Arabic? Salam Aleikum. Hi, how are you doing? They shouldn't take me for a bedouin.

MS. ZAIA: Yeah. Or Chaldean.

MR. BOONE: No, I'm single now. I just went through a divorce.

MS. ZAIA: Good for you. You're like me. I don't like marry.

MR. BOONE: Hi, stranger, How are you? boy, she has grown.

MS. ZAIA: Everybody they know you here.

MR. BOONE: Yeah, I'm popular. That's why -- I know a lot of people. I used to each lunch, breakfast and dinner here.

MS. ZAIA: Oh. (Inaudible).

MR. BOONE: You should stay here the next time.

MS. ZAIA: No. When I give you a call (inaudible).

MR. BOONE: [conversation with 3rd person - starting with Hi, how are you doing. Haven't seen you for a long time.] I've gotta get back. You know the Bokadeer (ph.) Hotel? I'll write it down for you.

MS. ZAIA: No.

MR. BOONE: All right. Okay. Nice to meet you. Your English is good.

Okay, thank you. Good-bye.

MS. ZAIA: Good-bye.

(Whereupon the conversation was concluded.)

(3)

No. 94-1002

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NEERAN ZAIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entrapped as a matter of law as a result of the undercover investigation that led to her prosecution for bribery, visa fraud, and alien smuggling.

2. Whether petitioner was a victim of outrageous government conduct requiring dismissal of the indictment under the Due Process Clause of the Fifth Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is unpublished, but the judgment is noted at 35 F.3d 567 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1994. The petition for a writ of certiorari was filed on December 5, 1994, and is therefore out of time under Rules 13.1 and 13.4 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on seven counts of visa fraud, in violation of 18 U.S.C. 1546(a) (Counts 6-12); three counts of bribery, in violation of 18 U.S.C. 201(b)(1) (Counts 17-19); and one count of alien smuggling, in violation of 8 U.S.C. 1324(a)(1)(D) (Count 20).[1] She was sentenced to concurrent prison terms of 15 months, to be followed by two years' supervised release. The court of appeals affirmed. Pet. App. 1a-36a.

1. In the wake of the Persian Gulf War, petitioner, who operated a travel agency in Detroit, advertised on an Arabic-language television station that she could assist Catholic Iraqis (Chaldeans) who had fled to Jordan emigrate to another country. Gov't C.A. Br. 3-4. Sixteen Chaldeans or their Detroit-area relatives hired petitioner for that purpose in late 1991. Pet. App. 3a; Gov't C.A. Br. 5. Promising to obtain visas for Mexico or Canada, petitioner charged fees ranging from $2,000 to $5,000 per person, exclusive of travel and lodging expenses. Pet. App. 3a; Gov't C.A. Br. 5, 22-23. Instead of securing the promised visas, however, petitioner gave the Chaldeans "passports" issued by the "World Service Authority" (WSA), a private group that espouses world citizenship, and tourist visas for the Dominican Republic, where the group stayed for about two months. Pet. App. 3a-4a; Gov't C.A. Br. 5-6, 22.

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[1] Petitioner was acquitted on five other counts of visa fraud (Counts 1-5) and four other counts of bribery (Counts 13-16). 1 C.A. Joint App. 53. A count charging conspiracy to commit an offense against the United States, in violation of 18 U.S.C. 371 (Count 21), was dismissed on motion of the government. 1 C.A. Joint App. 53.

While in the Dominican Republic, petitioner tried to obtain United States visas at the United States Embassy by claiming that the group planned to travel through the United States in order to vacation in Acapulco, Mexico. An Embassy official denied the visas, explaining that the United States does not recognize WSA passports as valid. Pet. App. 4a; Gov't C.A. Br. 6.

After unsuccessful attempts to have Nicaragua and Guatemala accept the group, petitioner arranged for the Chaldeans to fly to Belize (formerly British Honduras), where they stayed at a hotel run by an American citizen, Sue Williams. Petitioner told Williams that the group was touring Belize and that she was their guide. Petitioner then asked Williams if she knew anyone at the United States Embassy who could help them get visas to the United States. Petitioner added that she would be bringing "lots of people through" and that if Williams acquired the proper contact, they "both could make lots of money." Suspicious, Williams reported this conversation to Rudolph Boone, the United States Consul at the American Embassy in Belize City. Boone was already aware of the Iraqis' presence, having received a State Department cable to the effect that petitioner had tried to bribe a Guatemalan official to furnish visas for her group. Boone relayed Williams' information to the State Department. Pet. App. 4a-5a, 13a-15a & n.4; Gov't C.A. Br. 6-7, 13-14, 17, 22-23.

On instructions from the State Department, Boone arranged a meeting with petitioner on February 5, 1992, at a restaurant owned by Williams. Pet. App. 5a. Boone surreptitiously taped that and subsequent meetings with petitioner. *Ibid*; Gov't C.A. Br. 8. Identifying himself as "the counsel, the chief of the section," Boone told petitioner that he had heard she was with a group and

that "you might need some help and I was wondering what that was." Pet. App. 51a. Petitioner replied that her group was Iraqi and had trouble getting visas. *Id.* at 51a-53a. Boone said, "if I can help you, let me know[.]" *Id.* at 57a. Petitioner confirmed that she could use his help and asked "what kind" he could give her. *Ibid.* When Boone answered, "[w]ell, you tell me," petitioner said that "every month" she had a "different group" seeking to go to Canada, Mexico, or the United States. *Id.* at 57a-58a. Boone hesitated ("Well, I don't know about that"), *id.* at 58a, but petitioner pressed him ("So what are you going to do for them?"), *id.* at 59a. Boone asked, "[w]hat's in it for me?," and petitioner countered, "I don't know what are you going to do for me." *Id.* at 60a. When Boone agreed to obtain visas, petitioner thanked him, adding, "This is business. We're going to make money, you know." *Ibid.*

Boone again hesitated about getting visas for petitioner on a monthly basis, Pet. App. 63a, but petitioner pointed out that, right then, she had "just a few [people] left," and she urged him to "do something just between us," *id.* at 64a. Petitioner added, "if you like to work with me, we're going to work together." *Ibid.* She then asked for Belize passports and agreed not to call Boone at home. *Id.* at 66a-67a. When Boone asked her, "How much is this worth to you?," petitioner replied, "I don't know what you gonna do[.]" *Id.* at 68a. Boone promised to obtain visas for the United States, and petitioner asked "[h]ow long" it would take. *Id.* at 68a-69a. After discussions about price, volume, and timing, petitioner instructed Boone: "Okay, go ahead, start." *Id.* at 72a. Boone agreed to issue two visas that day and the rest later. *Id.* at 73a, 79a. The meeting ended after

petitioner had Boone promise to meet her again at a particular time and place. *Id.* at 80a-81a.

Over the next six days, petitioner met with Boone five more times. Gov't C.A. Br. 9. At each meeting, petitioner gave Boone Iraqi passports, and he returned them stamped with non-immigrant United States visas in exchange for cash. *Id.* at 9, 13. All told, petitioner paid Boone $3,750 for 12 visas. Pet. App. 3a, 6a-7a; Gov't C.A. Br. 9, 18.[2] During their meeting on February 10th, petitioner asked Boone for his address and telephone number and told him, "I don't want it to be too hard to call you." 2 C.A. Joint App. 524. At their February 11th meeting, petitioner invited Boone to visit her home and office in Detroit. *Id.* at 552. She also gave him her home telephone number and said that he should call her collect. *Id.* at 557.

The 12 aliens for whom petitioner had secured fraudulent visas traveled to the United States in two groups: One group entered the country through New Orleans with petitioner, while the other group entered through Houston. When a Customs inspector in New Orleans questioned petitioner about the visas, she denied knowing anything about them. She claimed that the group was planning to attend Mardi Gras, then return to Jordan or Belize. In fact, the group did not attend Mardi Gras, but went to Detroit. Pet. App. 7a; Gov't C.A. Br. 10.

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[2] The two visas that Boone issued to petitioner on February 5th were the subject of Counts 1 and 2 of the indictment; he issued three visas to her on February 7th, which were the subject of Counts 3, 4, and 5. Those five visa fraud counts were the ones on which she was acquitted. She was also acquitted on the briberies charged on February 5th (Count 13), February 6th (Counts 14 and 15), and February 10th (Count 16). See Pet. App. 6a.

At petitioner's direction, the four aliens for whom she was unable to obtain visas traveled from Belize to Mexico, where they swam across the Rio Grande River at night to Brownsville, Texas. There, they met up with petitioner's co-defendant, Hazim Saeegh, who had been waiting for them. Pet. App. 3a, 7a; Gov't C.A. Br. 10-11, 14, 23.

On February 20, 1992, Boone met petitioner in her Detroit office, in accordance with her previous invitation. The two and Saeegh discussed an expanded role for Boone in their visa business, *i.e.*, if Boone processed about 30 Iraqis per month as well as some Chinese immigrants, they would pay him $500 for each fraudulent immigrant visa and $1,000-$2,000 for each passport. In addition, with petitioner present, Saeegh asked for Boone's help in transferring to Belize an immigration petition that was pending in Algeria. Boone agreed to handle the matter for $500. The next day, in Boone's hotel room, Saeegh gave Boone the file on that case, and petitioner handed Boone $500 in cash. Pet. App. 7a-8a, 18a; Gov't C.A. Br. 11, 13-14, 18.

2. Petitioner asserted an entrapment defense at trial and moved for a judgment of acquittal on the ground that she had been entrapped as a matter of law. Pet. App. 9a. The district court denied the motion and submitted the entrapment issue to the jury. *Ibid.* Without objection, the court gave the Sixth Circuit's pattern instruction on entrapment. *Id.* at 18a. See also Pet. C.A. Br. 44 (conceding that defense counsel had "agreed to the instruction given"). The jury found petitioner guilty as indicated above.

Following the verdict, petitioner moved to dismiss the indictment, on the ground that the manner in which the government had investigated her was so outrageous as to

violate due process. 1 C.A. Joint App. 35, 47-50. The district court assumed that a defense of outrageous government misconduct exists under the Due Process Clause, but it rejected petitioner's claim, explaining that it did not believe that the government's conduct in this case was in fact "outrageous." 2 C.A. Joint App. 399.

3. The court of appeals affirmed. Pet. App. 1a-36a. The court rejected petitioner's claim that she had been entrapped as a matter of law. Relying on *Jacobson* v. *United States*, 112 S. Ct. 1535, 1541 (1992), for the proposition that a defendant's "ready commission of [a] criminal act" demonstrates predisposition, Pet. App. 12a, the court found that, viewed in the light most favorable to the government, the evidence "justifie[d] the inference that [petitioner] was * * * predisposed to commit the crimes for which she was convicted[,]" *id.* at 14a-15a.

The court also rejected petitioner's claim that she was the victim of outrageous government conduct. The court reasoned that petitioner

> was the one who first approached Williams about making contact with an employee of the United States embassy in Belize * * *, and that [petitioner] on her own, without any government participation or knowledge, sent four of her clients into Mexico illegally, without, [*sic*] visas of any kind * * *. It was also [petitioner] who selected which passports to give to Boone * * *; and it was [petitioner] who created the need for her illegal activities by bringing her clients to Belize without any realistic chance of obtaining legitimate visas for them.

Pet. App. 22a-23a. The court also acknowledged the government's argument that, in order to investigate petitioner's apparent interest in obtaining fraudulent visas, "it had no choice but to present someone to be

bribed, namely Boone[.]" Accordingly, the court concluded that petitioner had "show[n] enough initiative in the conduct of the criminal activities at issue here to prevent our finding that the government['s] conduct in this case was so outrageous as to shock the universal sense of justice." *Id.* at 23a (internal quotation marks omitted).

ARGUMENT

1. Petitioner renews her contention that she was entrapped as a matter of law. Pet. 31-52. That claim does not merit review.

a. A valid entrapment defense has two related elements: (1) government inducement of the crime, and (2) a lack of predisposition on the part of the defendant to engage in the criminal conduct. *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). "Predisposition, the principal element in the defense of entrapment, * * * focuses upon whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime." *Ibid.* (citations and internal quotation marks omitted). Petitioner claims that she had only a "generalized desire" to protect refugees, and that, "but for the creative intervention of Consul Rudolph Boone," she would not have committed any crimes. Pet. 49-50.

As petitioner recognizes (Pet. 32 n.4), in evaluating a claim of entrapment as a matter of law, the evidence of predisposition must be viewed in the light most favorable to the government. See, *e.g.*, *United States* v. *Martinez*, 979 F.2d 1424, 1430 (10th Cir. 1992), cert. denied, 113 S. Ct. 1824 and 113 S. Ct. 3019 (1993); *United States* v. *Ford*, 918 F.2d 1343, 1348 (8th Cir. 1990); *United States* v. *Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987). Viewed in that light, the evidence

does not support petitioner's claim that she committed the crimes at issue because of "irresistible inducement," Pet. 41, 50, by "an overly zealous" Boone, *id.* at 48.

Boone contacted petitioner only after she had promised Sue Williams a chance to make "lots of money" if Williams put her in touch with anyone in the United States Embassy who could supply her with visas. When petitioner and Boone met, she "showed no reluctance whatsoever to break the law," and she "very quickly warmed to the idea" of bribing him for fraudulent visas. Pet. App. 13a-14a. Indeed, at their first meeting, the discussion focused less on whether petitioner would pay a bribe than on how large the bribe would be, how many visas Boone could obtain, and how quickly. When Boone at first provided only two visas, petitioner sought additional meetings with him in order to obtain visas for the rest of her group, and met with him five more times in Belize for that purpose. Over the course of a week, petitioner paid Boone a total of $3,750 in bribes in exchange for 12 fraudulent visas. See Pet. App. 3a, 6a-7a; Gov't C.A. Br. 9, 18.[3]

Petitioner's intent to promote her illegal immigration business on a continuing basis, with or without Boone's help, also showed her predisposition. At their first meeting, petitioner informed Boone that she would be back for more visas every month. Pet. App. 57a-58a. When Boone expressed doubt that he could accommodate her, *id.* at 58a, petitioner encouraged him by saying:

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[3] That petitioner was acquitted on several counts of visa fraud and bribery did not, of course, preclude consideration of the conduct underlying those counts as evidence of predisposition. Cf. *United States* v. *Powell*, 469 U.S. 57, 65 (1984) (jury may have acquitted out of "mistake, compromise, or lenity," even though "convinced of guilt").

"This is business. We're going to make money, you know," *id.* at 60a. Later, petitioner arranged—without the involvement of Boone or any other government agent—for four of her "clients" to enter the United States illegally through Mexico. She also renewed contact with Boone in Detroit, where she paid him $500 to act on an immigration petition and offered him substantial money to process a steady stream of illegal immigrants. Gov't C.A. Br. 10-11. That evidence was sufficient to support the jury's conclusion that petitioner was amply predisposed to engage in an illegal immigration scheme.

b. Petitioner also argues (Pet. 31, 41-42, 50) that the court of appeals misapplied *Jacobson* by overlooking its requirement that the defendant's disposition to commit the criminal act be shown beyond a reasonable doubt to have existed before and independently of the government's contacts with her, 112 S. Ct. at 1540 n.2, 1543. While concluding that the defendant in that case was not predisposed to commit the offense in question before government agents persistently pressured him to break the law, the *Jacobson* Court reaffirmed the longstanding principle that a prosecution will not be defeated when government agents "merely afford opportunities or facilities for the commission of the offense," and that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." 112 S. Ct. at 1540. The Court explained:

> Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply

> provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition.

112 S. Ct. at 1541. The court of appeals expressly relied on that portion of the *Jacobson* decision, see Pet. App. 10a-11a, and correctly applied it to the instant case, see *id.* at 13a-16a.

As the court of appeals observed, the evidence showed that, "regardless of who first suggested that the visas could be obtained for money," Pet. App. 13a, petitioner readily and willingly availed herself of the opportunity to bribe Boone. That action, coupled with her prior efforts to locate an embassy official to bribe, confirmed that petitioner was not "an otherwise law-abiding citizen who, if left to h[er] own devices, likely would have never run afoul of the law[.]" *Jacobson*, 112 S. Ct. at 1543.[4]

Contrary to petitioner's contention (Pet. 32-33), the conclusion reached by the court of appeals in this case does not conflict with *United States* v. *Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc). In *Hollingsworth* the majority stated that *Jacobson* had changed the law of entrapment, because the government must now prove that the defendant was "ready and willing" to commit the crime not only in the traditional sense of having been

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[4] We note that petitioner does not challenge the district court's entrapment instruction in this Court. That instruction repeatedly cautioned that a guilty verdict may not be returned if "the government persuaded a defendant who was not already willing to commit a crime to go ahead and commit it." The Sixth Circuit correctly regards that language as "consistent with *Jacobson*," *United States* v. *Sherrod*, 33 F.3d 723, 725-726 (1994), petition for cert. pending, No. 94-7209, and petitioner does not argue otherwise.

amenable to doing so, but also in the sense of having been "so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so." *Id.* at 1200. The court of appeals in this case stated that its precedents were "more in line" with Judge Ripple's panel dissent in *Hollingsworth*, which the five dissenting judges endorsed when the case was reheard en banc. Pet. App. 12a (citing *United States* v. *Hollingsworth*, 9 F.3d 593, 603-604 (7th Cir. 1993) (Ripple, J., dissenting)). That statement, however, does not indicate a conflict that warrants resolution in this case, because petitioner's conviction would be affirmed even under the analysis of the *Hollingsworth* majority.

Petitioner's conduct made her, under *Hollingsworth*, the sort of "traditional [sting] target" for whom "all that must be shown to establish predisposition and thus defeat the defense of entrapment is willingness to violate the law without extraordinary inducements; ability [to violate the law] can be presumed." See 27 F.3d at 1200. Petitioner was the moving force in seeking to obtain visas through a fraudulent scheme, as demonstrated by her prior attempt to bribe the Guatemalan authorities, her offer of "lots of money" to Williams in exchange for an embassy contact, her promise to Boone that the scam would be a continuing money-making operation, and her subsequent smuggling of four illegal aliens into the United States through Mexico without any help from Boone or any other involvement by the government.[5]

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[5] Petitioner faults the court of appeals for mentioning her attempted bribery of a Guatemalan official, claiming that the government improperly elicited testimony about it from Boone "on redirect examination." Pet. 42 n.15. In fact, Boone referred to it

Petitioner clearly was "in a position without the government's help to become involved in illegal activity" of the very type of which she was convicted. *United States* v. *Hollingsworth*, 27 F.3d at 1200.

Nor is this case "strikingly similar" (Pet. 39) to *United States* v. *Sandoval*, 20 F.3d 134 (5th Cir. 1994). The defendant in *Sandoval* initially explored lawful means to resolve his tax liability, and reluctantly agreed to pay a bribe only after a government agent, playing upon the defendant's financial weakness, "doggedly steered [him] away from a legitimate reward for information," *id.* at 138, and toward a benefit for herself. Here, by contrast, the agent, Boone, did not approach petitioner until she had already tried to involve Williams in her illegal immigration scheme. Petitioner then "showed no reluctance whatsoever to break the law," Pet. App. 13a, when offered the opportunity. She also continued to break the law both with and without Boone. Those facts bear scant resemblance to *Sandoval*.

2. Petitioner also claims (Pet. 52-55) that the indictment should have been dismissed under the Due Process Clause of the Fifth Amendment, because Boone engaged in outrageous misconduct.[6]

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on cross-examination, in response to defense counsel's criticism of him for not telling petitioner directly of his concerns about her group's presence in Belize. 12/7/92 Tr. 170. After eliciting that testimony, defense counsel moved for a mistrial. The district court correctly denied that motion, noting that Boone had not "blurted out [something] that had no relationship to anything asked of him." *Id.* at 177.

[6] A claim of outrageous government misconduct raises a purely legal defect in the institution of the prosecution, which is waived unless raised prior to trial under Fed. R. Crim. P. 12(b)(1) and (b)(2). See, *e.g.*, *United States* v. *Henderson-Durand*, 985 F.2d 970, 973 & n.5 (8th Cir.), cert. denied, 114 S. Ct. 164 (1993); *United*

This Court has never held that the government's mere use of undercover agents, or the use of deception by them, gives rise to a due process defense, although in *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), it left open the possibility that conduct of law enforcement officials may be "so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." The courts of appeals have expressed different views on whether any outrageous government conduct defense exists, compare *United States* v. *Tucker*, 28 F.3d 1420, 1428 (6th Cir. 1994) (no defense exists as to predisposed defendant), petition for cert. pending, No. 94-6963, with *United States* v. *Kelly*, 707 F.2d 1460, 1461, 1476 (D.C. Cir.) (opinion of R.B. Ginsburg, J., for the court) (suggesting that coercion, violence, or brutality is required), cert. denied, 464 U.S. 908 (1983); *United States* v. *Myers*, 692 F.2d 823, 836-843 (2d Cir. 1982) (same), cert. denied, 461 U.S. 961 (1983), but no court of appeals has held that a predisposed defendant may establish a violation of due process merely because she purportedly was induced to commit the crime by an undercover agent. Indeed, while the court of appeals noted that it does not recognize a due process defense, Pet. App. 23a-24a n.6 (citing *Tucker*, *supra*), it concluded that in any event petitioner "showed enough initiative in the conduct of the criminal activities at issue here to prevent [a] finding that the government conduct * * * was so outrageous as to 'shock the universal sense of justice.'" Pet. App. 23a. The district court expressed the same view. 2 C.A. Joint App. 399.

States v. *Duncan*, 896 F.2d 271, 274 (7th Cir. 1990); *United States* v. *Nunez-Rios*, 622 F.2d 1093, 1099 (2d Cir. 1980). Because petitioner first made her claim of "outrageousness" in a post-verdict motion, she waived that claim.

None of the court of appeals decisions on which petitioner relies (Pet. 53-54) assist her due process claim. In *United States* v. *Twigg*, 588 F.2d 373 (1978), a divided panel of the Third Circuit reversed convictions where government agents had supplied the defendants—who had previously been "lawfully and peacefully minding [their] own affairs," *id.* at 381; see also *id.* at 382—with the chemicals, laboratory, and expertise necessary for them to manufacture methamphetamine. As the Third Circuit recently noted, however, it has never applied *Twigg* since that case was decided, see *United States* v. *DeRewal*, 10 F.3d 100, 105 n.3 (1993), cert. denied, 114 S. Ct. 1544 (1994), and that court also has suggested that *Twigg* was wrongly decided. See *United States* v. *Beverly*, 723 F.2d 11, 12 (3d Cir. 1983). Moreover, even were *Twigg* still authoritative, it is distinguishable. Unlike the government agents in *Twigg*, Boone merely presented petitioner with an opportunity to do what she intended to do both before and after meeting him: get Chaldeans into the United States by any means necessary, legal or illegal.

Nor is petitioner aided by *United States* v. *Solorio*, 37 F.3d 454 (9th Cir. 1994). That case turned on the panel's perception (which we have disputed in a rehearing petition that remains pending) that a drug informant "was paid a fee contingent on conviction." 37 F.3d at 458; see also *id.* at 459, 460 (reemphasizing that payments were contingent on "getting people convicted"). The panel deemed such a contingency fee outrageous because it provides "too great an incentive for informants to fabricate evidence and to maximize the amount of drugs

involved." *Id.* at 458. Plainly, *Solorio* is factually inapposite to the instant case.[7]

Finally, petitioner relies on *United States* v. *Harris*, 997 F.2d 812 (1993), which she characterizes as "an entrapment case" in which the Tenth Circuit "stated in dicta that an alternative ground for reversing the conviction was that the government's conduct approached being sufficiently outrageous to sustain a due process defense." Pet. 54 n.19. In *Harris*, the district court had dismissed two drug counts on grounds of outrageous government conduct. On the government's appeal, the Tenth Circuit "concluded [that] the government did not create the crimes for which Defendant is charged" and that the undercover agent's payment of the defendant in cocaine for his role as a middleman in the drug transaction was not "so coercive that [his] due process rights were impinged." 997 F.2d at 818. The court found the record unclear, however, on the question whether the agent knew that the defendant was an addict and nevertheless "reli[ed] on that addiction to conduct multiple transactions" lacking "a specific investigatory purpose." *Id.* at 818-819. The court remanded for a determination of that factual issue. *Id.* at 819. Petitioner is not akin to the addict in *Harris*.

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[7] Petitioner also cites (Pet. 54) the Ninth Circuit's decision in *Greene* v. *United States*, 454 F.2d 783 (1971), where the court found that, over at least a 2 1/2-year period, the government had created and maintained bootlegging operations, for which it served as the only customer. That conduct cannot be compared to the discrete episode in this case. In addition, *Greene* was one of the authorities necessarily rejected by this Court's ruling in *Hampton* v. *United States*, 425 U.S. 484 (1976). See *id.* at 498 (Brennan, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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